IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

L. R. ROBERTS,
Petitioner,

vs.

NORMAN B. HESS, Warden,
Respondent.

No. 79-C-550-C

ORDER

This proceeding is brought pro se pursuant to the provisions of Title 28 U.S.C. §2254 by a state prisoner confined in the Oklahoma State Penitentiary at McAlester, Oklahoma. Petitioner attacks the validity of the judgments and sentences rendered by the District Court of Tulsa County, State of Oklahoma in Case Nos. CRF-69-1972 and CRF-70-547. Petitioner pleaded guilty in those cases to charges of grand larceny and uttering a forged instrument. Petitioner was then sentenced to two concurrent one-year terms of imprisonment. Petitioner is presently serving a sentence other than the ones under attack in the present petition. Petitioner did not appeal from the convictions involved herein. Petitioner applied to the Tulsa County District Court for post-conviction relief. That application was denied, which denial was affirmed on appeal.

Petitioner demands such relief as he may be entitled to in these proceedings. As grounds therefor, the petitioner alleges that the entry of his guilty pleas and his subsequent sentencing were inconsistent with due process requirements because of the reliance of the prosecution and the trial judge on a prior juvenile conviction of the petitioner (No. 20942) that some eight years later was declared void as unconstitutional under the decisions of Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972), Radcliff v. Anderson, 509 F.2d

1093 (10th Cir. 1975), and Bromley v. Crisp, 561 F.2d 1351 (10th Cir. 1977).

The Court has reviewed the petition, response, the reply to the response, the amended reply to the response, and the files of the state proceedings, and being fully advised in the premises, finds that an evidentiary hearing is not required and the petition before the Court should be dismissed. The Court further finds that there is no need for the appointment of counsel. The petitioner's Motion for Appointment of Counsel should therefore be denied.

As was noted above, the petitioner is not presently serving the sentences here under attack. The sentences under attack have been fully served. Petitioner does not allege and there is no proof of any connection between those sentences and petitioner's present sentence. Absent a "positive, demonstrable relationship between the prior conviction and the petitioner's present incarceration. . . .", Sinclair v. Blackburn, 599 F.2d 673, 676 (5th Cir. 1979), the Court must conclude that it lacks jurisdiction over the present petition because the "in custody" requirement of Section 2254 has not been satisfied. Id. See Harrison v. State, 597 F.2d 115 (7th Cir. 1979); Craig v. Beto, 458 F.2d 1131 (5th Cir. 1972); Diehl v. Wainright, 423 F.2d 1108 (5th Cir. 1970); Cappetta v. Wainright, 406 F.2d 1238 (5th Cir. 1969); Mason v. Anderson, 357 F.Supp. 672 (W.D.Okla. 1973). See also Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968).

For the foregoing reasons, it is therefore ordered that the petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 of L. R. Roberts, be and it is hereby dismissed. It is further ordered that the petitioner's Motion for Appointment of Counsel is hereby denied.

It is so Ordered this 30th day of June, 1980.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JAMES W. BOLT,

Plaintiff,

vs.

UNIVERSITY BANK, an Oklahoma corporation, Richard L. Wheatley, and Rodney H. Fulton,

Defendants.

No. 80-C-34-B

FILED

JUN 30 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

On June 23, 1980, this case came on for hearing on defendants' Motion to Dismiss filed pursuant to Rule 12(b), Federal Rules of Civil Procedure. After careful consideration of the complaint and amended complaint, arguments and briefs of counsel, and the applicable law, the Court finds that the amended complaint should be dismissed for failure to state a claim upon which relief can be granted.

The complaint alleges that the defendants

> "...did with malice conspire to unlawfully charge the plaintiff with a felony crime and cause him to be arrested, confined and imprisoned in the County Jail of Payne County, State of Oklahoma under color of law in violation of the Civil Rights Act of the United States Code, Title 42, Sec. 1983, all without probable cause."

Plaintiff further charged that defendant Fulton, with the instruction and concurrence of defendant Wheatley (both were officers of defendant bank), initiated criminal proceedings against plaintiff in the District Court of Payne County, Oklahoma, by presenting an affidavit which defendants knew to be untrue. On the basis of this affidavit, the Assistant District Attorney of Payne County filed criminal charges against plaintiff, and as a result plaintiff was arrested and confined and required to post a bond. At preliminary hearing held October 24, 1979, the charges were dismissed for failure of the state to show probable cause.

There is no allegation of a conspiracy between the Assistant District Attorney and the defendants, and he is not named as a defendant.

Upon defendants' filing of a Motion to Dismiss, plaintiff filed a responsive brief and an amended complaint, which adds the following language:

> "That on or about the 29th day of March, 1979 the defendant Rodney H. Fulton, acting in concert jointly and severally with defendant Richard L. Wheatley, both acting as officers and agents of defendant University Bank, did with malice conspire to unlawfully charge the plaintiff with a felony crime and did contact Assistant District Attorney Keith Ward and did then agree with him to file said criminal charge against the plaintiff, said agreement being that the defendants would file a formal complaint in the form of an information against said plaintiff and that predicated upon said information the Assistant District Attorney by agreement would charge the plaintiff by information, all in effort to extort moneys from the plaintiff in relation to loans the plaintiff had with defendant and thereby avoid civil and constitutional remedies and defenses available to both defendants and plaintiff; and said defendants did thereby cause the plaintiff to be charged with said crime and did further cause him to be arrested, confined and imprisoned in the County Jail of Payne County, State of Oklahoma under color of law in violation of the Civil Rights Act of the United States Code, Title 42, Sec. 1983, all without probable cause."

Defendants have also moved to dismiss the amended complaint.

Defendants assert that plaintiff has failed to state a cause of action under the Civil Rights Act, 42 U.S.C. §1983 because (1) he has not properly alleged that defendants acted under color of state law, and (2) the Assistant District Attorney is immune from suit and therefore no cause of action exists against these defendants for alleged conspiracy with an immune official.

In considering a Motion to Dismiss for failure to state a claim under Rule 12(b), the complaint is construed in the light most favorable to the plaintiff and its allegations are taken as true. Warner v. Croft, 406 F.Supp. 717 (W.D. Okl. 1975); Temo v. Associated Indemnity Corporation, 412 F.Supp. 1056 (W.D. Okl. 1976). A complaint should not be dismissed for failure to state a claim for which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957).

42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In order to state a claim under this section, the complaint must contain an allegation that the defendants were acting under color of state law. And even private individuals may act under color of state law if they conspire jointly with a state official to deprive a plaintiff of his constitutionally protected rights. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); Board of Education of Independent School District Number 53 of Oklahoma County, Oklahoma v. Board of Education of Independent School District Number 52 of Oklahoma County, Oklahoma, 532 F2d 730 (10th Cir. 1976).

In this case, taking the allegations of the complaint as true, it is clear that plaintiff alleges only that the defendants conspired among themselves and that the Assistant District Attorney filed the charges against plaintiff based upon the false affidavit of defendants. There is no allegation in the complaint or amended complaint that the Assistant District Attorney participated in or even knew of the alleged conspiracy.

At the hearing, plaintiff's counsel confirmed that there is no allegation of wrongdoing on the part of the Assistant District Attorney. Rather, it is plaintiff's position that this official was an "unwitting" co-conspirator, and that the only reason defendants were able to carry out their illegal purpose was through the mechanisms provided by the state. Plaintiff further argues that the requisite state action can be found because the state was a part of what was essentially a private action. This argument is unpersuasive. It is true that state action has been found in cases where a private individual was "clothed with authority of the state so as to render his actions substantially identical to actions taken by the state." Dennis v. Hein, 413 F.Supp. 1137 (D. S.Car. 1976); Jennings v. Shuman, 567 F2d 1213 (3rd Cir. 1977); Voytko v. Ramada Inn of Atlantic City, 445 F.Supp. 315 (D.C. N.J. 1978).

However, there is no allegation that defendants here were so clothed. Rather, the complaint alleges only that defendants' actions were those available to all citizens and not only to a select few. Further, allegations of deliberate giving of false information by an individual to cause the arrest of another, without more, does not state a claim for which relief can be granted under this statute. Kahermanes v. Marchese, 361 F.Supp. 168 (E.D. Pa. 1973).

Defendant urges as a separate ground for dismissal the immunity of the prosecutor. In Imbler v. Pachtman, 424 U.S. 409 (1976), the Supreme Court held that a state prosecuting attorney who is acting within the scope of his duties in initiating a prosecution and presenting the state's case is absolutely immune from a civil suit for damages under §1983. Plaintiff acknowledges this immunity, but claims that the prosecutor's immunity should not prevent an action against those who conspire with an immune state official. While the Tenth Circuit has not ruled on this question, other circuits have done so, and the weight of authority is contra to plaintiff's position. Haldane v. Chagnon, 345 F2d 601 (9th Cir. 1965); Hazo v. Geltz, 537 F2d 747 (3rd Cir. 1976); Kurz v. Michigan, 548 F2d 172 (6th Cir. 1977); Hansen v. Ahlgrimm, 520 F2d 768 (7th Cir. 1975).

Interestingly, the Fifth Circuit has recently overruled its former holdings and held that co-conspirators do act under color of state law and can be sued for violations of §1983 when an immune official is involved in the conspiracy, even when the official cannot be sued. Sparks v. Duval County Ranch Company, Inc., 604 F2d 1979 (5th Cir. 1979). The merits of both positions are fully discussed in Sparks, in both the majority and dissenting opinions. However, in this case there is no allegation that the prosecutor was involved in a conspiracy, and it is therefore unnecessary to decide whether the immunity of the prosecutor would preclude a §1983 action against these individuals.

IT IS THEREFORE ORDERED that defendants' Motion to Dismiss is hereby sustained, and the complaint and amended complaint are hereby dismissed.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF OKLAHOMA.

FARMERS INSURANCE EXCHANGE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 78-C-400-B
	)	
JAMES E. BROWN, Administrator of the Estates of WILBOURN EARL NATION, SHEILA NATION and MICHAEL BROWN; ET AL.,	)	
	)	
Defendants.	)	

ORDER ON STIPULATION

This cause came on for pretrial hearing on the 15th day of May, 1980. The Court made the following determinations at such pretrial:

1. This Court has jurisdiction of this cause.

2. James E. Brown, Administrator of the Estates of Wilbourn Earl Nation, Sheila Nation and Michael Brown, appears by his attorney of record, Gary L. Carson. Eddy Scott and Candy Scott, Guardians of Mitchell Brown and Christopher Nation, minor children, appear by their attorney of record, James E. Evans, Sr. Lewis C. Brown, individually, and as surviving heir and next of kin of Thelma Brown, deceased, appears by his attorney of record, William George Myers. Tom Wake, as surviving heir and next of kin of Diane Wake, deceased, appears by his attorney of record, A. Carl Robinson.

3. All other parties named as Defendants have either filed their disclaimer in this cause or have been dismissed on motions or have filed their voluntary dismissal herein and have no further claim with respect to the funds on deposit.

4. All other persons who have or might have had a claim have been barred by the Statute of Limitations and the only claimants to the fund presently deposited with the Court Clerk are those parties represented at this pretrial as above set forth.

Following this determination the parties entered into a discussion with reference to the disposition of the funds on hand

ROBINSON, LOCKE & GAGE
ATTORNEYS AT LAW
P. O. BOX 87
MUSKOGEE, OK 74401

and entered into a Stipulation which has heretofore been filed in this Court. The Court finds that said Stipulation should be and it is hereby approved.

It is, therefore, ordered that the Clerk issue checks as follows:

1.	Lewis C. Brown, individually, and William George Myers, his attorney	$8,994.18
2.	Lewis C. Brown, Executor of the Estate of Thelma Brown, deceased, and William George Myers, his attorney	727.76
3.	James E. Brown, Administrator of the Estate of Wilbourn Earl Nation, deceased, and Gary L. Carson, his attorney	867.61
4.	James E. Brown, Administrator of the Estate of Sheila Nation, deceased, and Gary L. Carson, his attorney	3,604.11
5.	James E. Brown, Administrator of the Estate of Michael Brown, deceased, and Gary L. Carson, his attorney	713.86
6.	Eddy Scott and Candy Scott, Guardians of Mitchell Brown, and James E. Evans, Sr., their attorney	2,564.69
7.	Eddy Scott and Candy Scott, Guardians of Christopher Nation, and James E. Evans, Sr., their attorney	1,392.55
8.	Tom Wake, as surviving heir and next of kin of Diane Wake, deceased, and A. Carl Robinson, his attorney	1,135.24
		$20,000.00

6-30-80 pw

Done this 30th day of June, 1980.

JUDGE FOR THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBINSON, LOCKE & GAGE
ATTORNEYS AT LAW
P. O. BOX 87
MUSKOGEE, OK 74401

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

RAY MARSHALL, Secretary of Labor, United States Department of Labor, Plaintiff-Petitioner,	)	Civil Action File
v.	)	No. 78-C-126-E
EUBANKS SECURITY PATROL, INC. and EDSEL F. EUBANKS, Defendants-Respondents,	)	

JUN 30 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

On the 12th day of February, 1980, counsel for Ray Marshall, Secretary of Labor, United States Department of Labor, plaintiff and petitioner herein and Eubanks Security Patrol, Inc. and Edsel F. Eubanks, defendants and respondents herein appeared in this Court for the purpose of showing cause why the defendants should not be held in civil contempt for nonpayment of this Courts' September 20, 1978 judgment against the defendant for violations of the Fair Labor Standards Act of 1938 as amended (29 U.S.C. 201, et seq.), hereinafter the Act. Prior to the commencement of the proceedings, the parties to this action announced that they had reached agreement as to the settlement of this matter. This agreement provides for the Secretary of Labor to withdraw its petition for adjudication of civil contempt and for the defendants to pay $11,836.59 to the plaintiff by cashiers or certified check in accordance with a schedule agreed upon by the parties and incorporated in the stipulation. The Court having reviewed the stipulation filed by the parties herein and finding that it upholds the public policy underlying the Act, it is hereby,

ORDERED that defendants pay $4,800.00 in twenty-four (24) equal installments of $200.00 each beginning with the first payment on or before April 10, 1980 with each payment thereafter made on or by the tenth day of each succeeding month.

ORDERED that beginning with the payment due for May 10, 1982 and on or before the tenth day of each succeeding month thereafter, the defendants pay to the plaintiff $7,036.59 in twenty-two (22) monthly installments of $320.00 each with the final payment being $316.59.

ORDERED that the terms of the Courts' September 20, 1978 judgment enjoining defendants from violation sections 15(a)(2) and 15(a)(5) of the Act shall remain in full force and effect.

Signed this 25th day of June, 1980.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

SOL Case No. 04820

RDW/sr

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KENNETH L. LEWIS and MARY K. LEWIS, Plaintiffs, vs. JIM WALTER HOMES, INC., Defendant and Third-Party Plaintiff, vs. HAROLD REAGAN, Third Party Defendant.	)	No. 79-C-675-E

FILED

JUN 30 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

ON THIS 30th day of June, 1980, upon the written Application of the parties for a Dismissal With Prejudice of the Complaint with reference to Plaintiffs' Second Cause of Action for alleged negligence, the Court having examined said Application, finds that said parties have entered into a compromise settlement covering only the Plaintiffs' Second Cause of Action for alleged negligence involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, with reservation of their First Cause of Action for breach of contract, and the Court being fully advised in the premises, finds that said Complaint should be dismissed as set out in Plaintiffs' Application. Further, that the Third Party Complaint representing actions over and against Harold Reagan for negligence should be dismissed without prejudice to refiling said claims to recover under subrogation and rights of indemnity.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint with reference to Plaintiffs' Second Cause of Action for alleged negligence filed herein against the Defendant be and the same hereby is dismissed with prejudice, with reservation to Plaintiffs' First Cause of Action for breach of contract. That the Third Party Complaint is dismissed without prejudice.

S/ JAMES O. ELLISON

JUDGE, DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVALS:

LAWRENCE D. TAYLOR

Attorney for Plaintiffs

KNIGHT, WAGNER, STUART & WILKERSON
RICHARD D. WAGNER

Attorney for Defendant

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

KENNETH L. LEWIS and

MARY K. LEWIS

Plaintiffs

vs No 79-C-675-E

JIM WALTER HOMES, INC.

Defendant

JOINT APPLICATION FOR DISMISSAL WITH PREJUDICE

Comes the Plaintiff and the Defendant, and shows the court that they have settled the issues herein, and any issues which could have been raised by amendment under the Federal Rules of Civil Procedure, and that this action should be dismissed with prejudice.

Kenneth L. Lewis

Mary K. Lewis

Lawrence D. Taylor, Attorney
Jim Walter Homes, Inc.

By _____
Attorney

ORDER OF DISMISSAL

Now on this 30th day of June, 1980, the court finding that the issues herein have been settled between the parties, the action of the Plaintiff should be and is hereby dismissed with prejudice.

S/ JAMES O. ELLISON

United States District Judge.

LAWRENCE A. D. JOHNSON
ATTORNEY AT LAW
732 E. 30TH PLACE
TULSA,
OKLAHOMA 74114
(918) 743-3012
743-0459

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CALVIN FENNEL, Plaintiff, VS PATRICIA ROBERTS HARRIS, Secretary of Health, Education and Welfare of the United States of America, Defendant.	)	80-C-135-C

NOTICE OF DISMISSAL

Comes now the above-named Plaintiff, Calvin Fennel, and hereby dismisses the above-entitled cause of action.

Calvin Fennell
Calvin Fennel
1553 East 53rd Street North
Tulsa, Oklahoma 74126

I hereby certify that I have hand delivered a copy of this Notice of Dismissal to the United States Attorney, 460 U. S. Courthouse, Tulsa, Oklahoma, this 27th day of June, 1980.

Calvin Fennell
Calvin Fennel

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. LEWIS W. BURT and ARDITH R. BURT, his wife, Defendants.	)	CIVIL NO. 79-C-660-E

STIPULATION OF DISMISSAL

COME NOW the United States of America by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and Lewis W. Burt and Ardith R. Burt by and through their attorney Vaden F. Bales, and herewith stipulate and agree that this action be and the same is hereby dismissed without prejudice.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

VADEN F. BALES
Attorney for Lewis W. Burt and
Ardith R. Burt

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACK BERTOGLIO and MID-AMERICAN AIR DISTRIBUTORS, INC., a Kansas corporation,

Plaintiffs,

vs.

WILLIAM W. BAILEY,

Defendant.

NO. 79-C-435-E

ORDER OF DISMISSAL WITH PREJUDICE

This cause came on to be heard on plaintiffs' Motion To Dismiss With Prejudice the above entitled cause; the Court finds after due deliberation that this cause should be dismissed with prejudice and the defendant, William W. Bailey, should be and is released from any and all claims which said plaintiffs may have against said defendant arising out of the transaction and occurrence which is the subject of this lawsuit.

IT IS THEREFORE ORDERED that this cause be and is hereby dismissed with prejudice.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 80-C-233-E
MAZIN K. GHAZAL, et. al., Defendants.	)	

STIPULATION OF DISMISSAL

COME NOW the United States of America, Plaintiff, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and County Treasurer, Tulsa County, and Board of County Commissioners, Tulsa County, Defendants, by and through their attorney, John F. Reif, Assistant District Attorney, and stipulate and agree that this action be and the same is herewith dismissed, without prejudice, each party to bear its own costs.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

JOHN F. REIF
Assistant District Attorney
Attorney for Defendants,
County Treasurer, Tulsa County,
and Board of County Commissioners,
Tulsa County

FILED

JUN 26 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROGER PATTERSON,

Plaintiff,

-vs-

FIVE STAR ENGINEERING, INC., a corporation, d/b/a OSAGE OIL COMPANY and GAS-N-GO TRUCK STOP,

Defendant.

No. 80-C-296-~~BE~~

O R D E R

IT IS HEREBY ORDERED that the plaintiff's complaint shall be and is hereby dismissed without prejudice to the bringing of a future action.

Dated this 25th day of June, 1980.

S/ JAMES O. ELLISON

JUDGE, U. S. District Court
Northern District of Oklahoma

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BOBBY WAYNE MORRIS, JR.,
Plaintiff,
vs.
DOYLE BLYTHE,
Defendant.

No. 80-C-274-C

ORDER

This action is before the Court on its own motion. The Court has before it for consideration plaintiff's Complaint, seeking injunctive and monetary relief under Title 42, U.S.C. §1983, and defendant's Answer to the Complaint.

Plaintiff is an inmate at the Oklahoma state corrections facility at Hominy, Oklahoma. He alleges that his civil rights have been violated in that 1) he was punished for disagreeing with his case manager, Doyle Blythe, amounting to an infringement on his right to freedom of speech, and 2) he was unjustly punished after being given a false misconduct report. Plaintiff alleges that he has exhausted his administrative remedies.

Both the Supreme Court and the Tenth Circuit have held that federal jurisdiction does not lie where a purported civil rights claim is simply unsubstantial. Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1973); Wells v. Ward, 470 F.2d 1185, 1187 (10th Cir. 1972). Furthermore, this case is being prosecuted in forma pauperis under the authority of Title 28 U.S.C. §1915. Subsection (d) of §1915 permits the dismissal of an action the Court deems frivolous.

Plaintiff has alleged nothing in his Complaint that amounts to an infringement on a constitutionally-protected right. This action must therefore be dismissed.

It is so Ordered this 25th day of June, 1980.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROBERT N. SELSOR, Plaintiff,	)	
v.	)	No. 79-C-156-C
JOSEPH CALIFANO, JR., Secretary of Health, Education and Welfare, Defendant.	)	

JUDGMENT

This matter comes on for consideration on the Findings and Recommendations of the Magistrate. The Court has reviewed the file, the briefs and the recommendations of the Magistrate and being fully advised in the premises finds that the Findings and Recommendations of the Magistrate should be accepted and affirmed.

Plaintiff in this action has petitioned the Court to review a final decision of the Secretary of the Department of Health, Education, and Welfare denying him disability benefits and supplemental security income, provided for in Sections 216, 223 and 1602 of the Social Security Act, as amended. He asks that the Court reverse this decision and award him the benefits he seeks.

The matter was first heard by an Administrative Law Judge of the Bureau of Hearings and Appeals of the Social Security Administration, whose written decision was issued July 17, 1978. The Administrative Law Judge found that plaintiff was not entitled to disability benefits or supplemental security income. Thereafter, that decision was appealed to the Appeals Council of the Bureau of Hearings and Appeals, which Council on January 9, 1979, issued its findings that the decision of the Administrative Law Judge was correct and that further action by the Council would not result in any change which would benefit the Plaintiff.

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Thus, the decision of the Administrative Law Judge became the final decision of the Secretary.

Plaintiff contends that the Secretary's decision is incorrect and that the record supports his claim of disability. The Secretary's denial was predicated on his finding that the Plaintiff's mental condition had not been severe enough to be considered disabling under the Act for a continuous period of at least twelve months.

In his "Application for Disability Insurance Benefits" Plaintiff stated that his disability consisted of "mental-nerves," and that he became unable to work because of his disability on August 15, 1974. (Tr. 52).

The medical evidence does establish that plaintiff has the diagnosed mental impairment of manic depressive psychosis. Plaintiff has been treated for his mental problems since 1942. This condition apparently responded to treatment, because Plaintiff has successfully worked over the years. (Tr. 65).

The more recent evidence on plaintiff's psychiatric status is conflicting. Plaintiff's clinical psychologist, Warren Smith, concluded that Plaintiff "functions only at a marginal level." (Tr. 100). A psychiatrist at the Tulsa Psychiatric Center, Dr. Parkhurst, agrees with Dr. Smith and found Plaintiff's "prognosis is poor, especially if he should discontinue taking his medication." (Tr. 94).

Dr. Lee, the psychiatrist who performed a consultative examination of Plaintiff in January 1978, indicated that Plaintiff's medication was effectively controlling his problems. (Tr. 90-92). Dr. Lee reported the results of his examination as follows:

> Psychiatric examination reveals that he is oriented as to time, place, and person, and there are no defects of memory or sensorium. Intelligence is estimated to be average. There is no disturbance of reasoning at this time.

> He is quite calm at this time. There is no agitation or psychomotor disturbance. There is no evidence of objective anxiety or depression at the current time nor does he complain of anxiety or depression. There is no evidence of neurosis, following the classical lines of intrapsychic conflicts. There is no evidence of psychosis at this time, in the sense of a thought disturbance, or delusions, or hallucinations. The issue of psychosis at this time is one based on the history as given by the Tulsa Psychiatric Center and Mr. Selsor and his wife. Certainly, following the history as given, there is no construction of interests, there are no restrictions of daily activities, except for the statement by the wife that she feels that he is not up to working, there is no diminished ability to relate to other people, and there is no deterioration in personal habits. He is quite neatly dressed in inexpensive clothing and there is good body hygiene and his clothes are neat.
>
> Psychiatric examination reveals by history that he has recurrent episodes since age 19 of what sound like to be clear, precise episodes of a manic episode so that the diagnosis by history would have to be manic-depressive psychosis, manic type. On cross-sectional examination on 1-19-78, there is no evidence of this condition. Thus, we would have to presume that he is in remission and we would have to presume that the Lithium is working very effectively. From the examination, he is capable of managing benefit payments in his own interest. Historically, he has been able to work in between episodes. The wife felt that he was not able any longer to work and that he needed to be taken care of.

(Tr. 91-92).

The administrative record reveals that Plaintiff was 51 years old in August 1974, when he alleged he became unable to work. He has a twelfth grade education and has taken a vocational rehabilitation course in auto mechanics. His vocational background includes work as a janitor, maintenance man, receiving clerk, hardware salesman, and general laborer. After considering the entire record, the Secretary determined that Plaintiff's mental condition had not been severe enough for a continuous period of at least twelve months to

preclude his performing any of his former work activities.

In his summary and evaluation of the evidence, the Administrative Law Judge noted that "the various examining physicians have reached varying conclusions as to whether claimant could function." Based on the examination conducted by Gary M. Lee, M.D., a psychiatrist, in January 1978, the Administrative Law Judge concluded "that when claimant takes his prescribed medication, he is able to function in an appropriate manner and work with other people." (Tr. 10). The Administrative Law Judge also considered activities which the claimant had engaged in at or about the time of the hearing from which the Administrative Law Judge found that claimant could function "within normal limits." The Adminisrative Law Judge recognized that the claimant "does have a chronic condition and in an acute stage" which "would clearly restrict his ability to engage in work activity," but that such "condition is amenable to medication and therapy." The Administrative Law Judge also found that based upon claimant's work record over the years that claimant has not been disabled "continuously since August of 1974)." (Tr. 10).

Judicial review of the Secretary's denial of Social Security Disability Benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g), and is not a trial de novo, Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the Courts if there is substantial evidence to support them. 42 U.S.C. § 405(g); Atteberry v. Finch, supra. Substantial evidence has been defined as:

> "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might

> accept as adequate to support a conclusion.'" Richardson v. Perales, 402 U.S. 389, 401, citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

It must be based on the record as a whole. See Glasgow v. Weinberger, 405 F.Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relas. Bd. v. Columbian Enameling & Stamping Co. 306 U.S. 292, 300 (1939), the Court, interpreting what consitutes substantial evidence, stated:

> "It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Cited in Atteberry v. Finch, supra; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Cellebrezze, 351 F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957). However, even though the findings of the Secretary are supported by substantial evidence, a reviewing court may set aside the decision if it was not reached pursuant to the correct legal standards. See, Knox v. Finch, 427 F.2d 919 (5th Cir. 1970); Flake v. Gardner, 399 F.2d 532 (9th Cir. 1968); Branham v. Gardner, 383 F.2d 614 (6th Cir. 1967); Garrett v. Richardson, 363 F.Supp. 83 (D.S.C. 1973).

After carefully reviewing the entire administrative record, the pleadings, and the briefs and arguments of counsel, the Court finds that the Administrative Law Judge applied the correct legal standards in making his findings on Plaintiff's claim for disability insurance benefits. The Court further finds that the record contains substantial evidence to support his findings.

An individual claiming disability insurance benefits under the Act has the burden of proving the disability. Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972). Plaintiff must meet two criteria under the act:

1. That the physical impairment has lasted at least twelve months that prevents his engaging in substantial gainful activity; and

2. That he is unable to perform or engage in any substantial gainful activity. 42 U.S.C. § 423; Alexander v. Richardson, 451 F.2d 1185 (10th Cir. 1971), cert. denied, 407 U.S. 911 (1972); Timmerman v. Weinberger, 510 F.2d 439 (8th Cir. 1975). The burden is not on the Secretary to make an initial showing of nondisability. Reyes Robles v. Finch, 409 F.2d 84 (10th Cir. 1969).

A mental impairment is not disabling per se, particularly where it can be alleviated by treatment. Crawley v. Finch, 300 F. Supp. 1343 (E.D. Ky. 1969); Bobb v. Gardner, 253 F. Supp. 610 (D.S.C. 1966). Moreover, it has been held that a claimant whose mental disorder was subject to a history of periods of remission during which he returned to work, is not entitled to disability benefits. Zimbalist v. Richardson, 334 F. Supp. 1350 (E.D. NY 1971).

As trier of facts, it is the Secretary's responsibility to consider all the evidence to resolve any conflicts in the evidence, and to decide the ultimate disability issue. Richardson v. Perales, 402 U.S. 389 (1971); Mayhue v. Gardner, 294 F. Supp. 853 (Kan. 1968), aff'd, 416 F.2d 1257 (10th Cir. 1969).

Although Plaintiff has alternatively prayed for remand of this case, it is clear that the good cause requirements for remand under 42 U.S.C. §405(g) demand more than a desire to relitigate the same issues. Bradley v. Califano, 573 F.2d 28 (10th Cir. 1978).

Because the findings of the Administrative Law Judge are supported by substantial evidence and because such findings are based upon the correct legal standards, it is the determination of the Court that Plaintiff is in fact not

entitled to disability benefits under the Social Security Act. Judgment is so entered on behalf of the Defendant.

Dated this 25th day of ~~January~~ June, 1980.

H. DALE COOK
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDNA M. CARROLL, d/b/a EDDIE CARROLL OIL PRODUCTION,

Plaintiff,

vs.

JON M. CARROLL, d/b/a CARROLL OIL PRODUCERS,

Defendant.

No. 80-C-197-E

ORDER DISMISSING ACTION

This matter comes on for hearing this 4th day of June, 1980 on the defendant's Motion to Dismiss for lack of in personam jurisdiction. Defendant specially appears by his counsel, Timothy E. McKee and Gable, Gotwals, Rubin, Fox, Johnson & Baker, by Teresa B. Adwan, and plaintiff appears by her counsel, Robert Lee Blackwood.

The Court, having examined the pleadings, briefs, affidavits and exhibits submitted by plaintiff and by defendant, and having considered the authorities cited therein, and having heard the arguments of counsel, and being fully advised in the premises, finds that this Court does not have personal jurisdiction over the defendant, and, defendant's Motion to Dismiss should be sustained and plaintiff's action should be dismissed.

IT IS THEREFORE ORDERED, that the Motion of the defendant, Jon M. Carroll, d/b/a Carroll Oil Producers, to dismiss the action for lack of in personam jurisdiction is sustained and plaintiff's action is dismissed, plaintiff's exceptions allowed.

IT IS SO ORDERED this 24TH day of June, 1980.

James O. Ellison

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Robert Lee Blackwood

Robert Lee Blackwood
Attorney for Plaintiff

Timothy E. McKee

Timothy M. McKee
Sidney G. Dunagan
Teresa B. Adwan
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 25 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

STATE FARM FIRE AND CASUALTY CO.,	)	
Plaintiff	)	
vs.	)	80-C-98-E
DALLAS D. CLARK, ADAM F. W. LEWIS, a minor, LARRY L. LEWIS and SUSAN ANN LEWIS	)	
Defendants.	)	

ORDER

Upon application of the Plaintiff herein for dismissal of its complaint and being fully advised in the premises, the Court finds that this should be dismissed.

IT IS THFREFORE ORDERED, ADJUDGED AND DECREED that the above and foregoing action is dismissed without prejudice.

S/ JAMES O. ELLISON

Judge of the United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HERBERT G. MILLER,
Plaintiff,

vs.

THE H. D. LEE CO., INC.,
Defendant.

No. 78-C-285-C

ORDER

The Court now considers plaintiff's Motion for Leave to File Amended Complaint, and defendant's Motion to Dismiss or in the alternative, for Summary Judgment.

This is an action by a former salesman for the defendant H. D. Lee Company, a manufacturer of jeans and work clothes, to receive compensation allegedly due him for services rendered to defendant. Plaintiff seeks his remedy under the alternative theories of contract enforcement and quantum meruit.

Plaintiff Miller was employed under a form contract (the Contract) that provided for Miller's compensation as follows:

> In consideration of the Company contracting with the salesman under which he can secure orders for the Company's products, of the mutual covenants and agreements herein contained and for other good and valuable consideration, it is hereby agreed as follows:
>
> * * *
>
> 9. The Company reserves the right to name the commission to be paid on all goods, and the salesman will be advised accordingly Salesman is to be advised of any change on commission rates, by giving salesman five days' notice in writing of such changes, but any such change shall not affect orders accepted by the Company on or before the date of change of commission.

Other than references to a non-fixed commission, no other compensation is provided for in the contract. Paragraph 14

29.

provides further that:

> upon termination, commissions on all unshipped orders written within Company policy shall be credited to the salesman's commission account upon shipment for up to 60 days from the date of termination; PROVIDED FURTHER that the terminated salesman's commission will be charged with all goods covered by any such orders which are refused by the customer or returned by the customer for credit. The terminated salesman will receive no credit for any orders taken by him not shipped before termination which do not qualify under the foregoing provisions.

The parties agree that Miller was working under an orally agreed upon 5% commission. During that time, Miller secured an order from The Haliburton Services, an enterprise in Duncan, Oklahoma, for 2,332 pairs of work pants, to be used on a trial basis with a possible result of a larger order later. Then, "[i]n a meeting between representatives of Lee and representatives of Haliburton in November, 1977, Haliburton orally committed itself to purchasing enough work pants to equip each of its employees with six pair." (Plaintiff's Petition, p.2). This later turned out to be about 49,000 pairs of pants, at $16.25 each, of which Miller was allegedly to be paid 5%.

However, on December 2, 1977, Lee informed Miller in writing that due to cost increases, his 5% would be reduced to 3%. Under Paragraph 9 of the Contract, this reduction would take effect five days afterward, or December 7, 1977.

In January, 1978, Lee informed Miller that it was reducing its sales force, and that he had a choice between relocating in Wichita, Kansas at a lower compensation than he had been earning as a salesman, or being terminated if he refused the transfer. Miller refused and was terminated on February 28, 1978.

Meanwhile, on December 5, 1977, Haliburton mailed a letter to Lee stating that Haliburton was satisfied with the Lee work pants, and that on January 1, 1978, it would begin to order the 49,000 pairs of pants it would need for its

workers. The letter authorized Lee "to secure materials and emblems to permit your furnishing 6000 suits by January 31, 1978, and 14,000 suits per month thereafter." Haliburton cited an apparently earlier agreed upon price, and stated "[i]f you are in agreement with the conditions of this commitment, please sign one copy and return." A reply beneath Haliburton's agents' signatures indicates Lee's acceptance, and an adjacent hand-written notation states: "Copy returned 12/19/77". See Affidavit of William G. Gillespie, and accompanying documents, filed Sept. 19, 1978.

On May 22, 1978, Miller filed this action in Tulsa County District Court, State of Oklahoma; defendant removed it to this Court on June 23, 1978. Miller states that he was paid 3% for the merchandise shipped within 60 days of his termination, in accordance with Paragraph 14 of the Contract. Miller seeks the remaining 2% (for a total of 5%) for the merchandise shipped within 60 days of February 28, 1978, and 5% on "all future sales by Lee to Haliburton". This requested relief is sought under the argument that the Contract obligates Lee to pay Miller 5% of the Haliburton order that he obtained. Alternatively, Miller asks for reasonable compensation, arguing that vagueness and ambiguity in the contract and the fact that Lee could name and change the commission, create an illusory contract, that is, one in which Lee's obligation to pay Miller is an illusion. The result, Miller argues, is that there is no contract between the parties, and Miller should be paid reasonable compensation for his services.

I. Plaintiff's Motion to Amend

In his proposed Amended Complaint, plaintiff makes the following changes:

1. In Paragraph No. 2, the third sentence is changed from "...territory within the State of Oklahoma..." to

"...territory which consisted of Oklahoma, Kansas, southwestern Missouri and western Arkansas..."

2. Paragraph No. 5 changes the second sentence from "In a meeting..." to "In a telephone conference..."

3. Paragraph No. 8 of the original Complaint reads:

> On January 22, 1978, Lee issued a letter to Miller confirming a telephone conversation of January 21, in which he was informed that he had the choice of either being terminated from employment with Lee effective February 22, 1978, or transferring to another territory headquartered in Wichita Falls, Texas. This position which was offered to Miller was a substantially less attractive one than that which he had formerly held, was made by Lee with the full expectation that it would be declined. Miller declined the position and was terminated arbitrarily, capriciously and in bad faith in an attempt to avoid all future payments to Miller of his commission on the Haliburton account. Lee has informed Miller that it intends to refuse to make any payments to him for deliveries made after sixty days subsequent to his termination.

The proposed Amended Complaint would read as follows:

> On January 21, 1978, Miller received a phone call from Mr. Paul Enger, National Sales Manager of Lee. Enger informed Miller that a decision had been made to make all of Lee's customer accounts "house accounts," and that therefore he was to receive no commission whatever on the Haliburton account after sixty days from February 28, 1978. Miller was also informed by Enger that the entire Lee Career Apparel sales force, of which he was part, was being discontinued and that he had the choice of either going to represent Lee as a salesman in the Wichita Falls, Texas area or leaving the Company. The Wichita Falls offer was at a very substantial reduction in compensation, and on February 28, 1978, Lee left the Company. Miller's departure from the Company did not in any way affect whether he received commission on the Haliburton account because the decision to cease paying him commissions on that account was made independent of the Wichita Falls offer. Had he accepted that offer, he would still not have been paid commission on sales to Haliburton.

4. Paragraph No. 9 in the Amended Complaint is new. It reads:

> At all times pertinent hereto those agents, other than Miller, representing Lee with respect to the Haliburton account, fully intended that the account was to become a "house account" and that Miller was to receive little or no compensation for his efforts with respect to making Haliburton a customer of Lee. Lee knowingly and willfully took advantage of Miller by accepting the benefits of his efforts knowing that it would not adequately compensate him for those efforts.

5. Paragraphs Nos. 10 and 11 of the proposed Amended Complaint are identical to Nos. 9 and 10 of the original Complaint. The ad damnum clause is the same.

Plaintiff's original Complaint (entitled "Petition"--it was filed in state district court and removed) states one cause of action in contract. Paragraphs 8 and 9 of the Complaint allege bad faith performance by Lee that was an

attempt to avoid paying plaintiff the compensation that was due him.

Bad faith performance can create a breach. The Tenth Circuit has stated:

> This brings into play the rule which imposes upon each party to any contract the duty of good faith performance to the end that neither party shall be deprived of the fruits of its bargain. Ryder Truck Rental, Inc. v. Central Packing Co., Inc., 10th Cir. 341 F.2d 321; Williston on Contracts, Third Edition, Section 670, p.159.

C. H. Codding & Sons v. Armour and Company, 404 F.2d 1 (10th Cir. 1968).

However, bad faith performance does not void the contract and is irrelevant to an illusory contract argument. See Restatement, Contracts §315. Thus, the allegations in the original Complaint are couched only in terms of a breach of contract.

Paragraph 10 of the Complaint concludes that Lee has breached the contract with Miller and thereby damaged him, and the ad damnum clause prays for damages on the contract. The Complaint closes with a catch-all prayer for "...all other just and proper relief to which he may be entitled and which the Court deems just and proper in law or equity." (emphasis added) The only other reference to an equitable remedy is in Paragraph 9, where plaintiff alleges that the contract is ambiguous, on which plaintiff in later pleading bases his argument that he is entitled to quantum meruit. In spite of the reference to equity and the allegation of ambiguity, the Complaint only states one cause of action in contract, and does not state one in equity on the theory of quantum meruit for an ambiguous or illusory contract.

In the pleadings that followed the original Complaint, plaintiff's arguments inclined toward an equitable remedy for quantum meruit for the services plaintiff had rendered to Lee. In Plaintiff's Brief, filed Aug. 22, 1978, in

response to defendant's Motion to Dismiss, plaintiff argues that "(i)t is clear from a review of Miller's Petition in the present action that he has set forth sufficient facts to place defendant on notice that it is being sued for breach of contract with respect to its failure to pay Miller a fair consideration for his services..." But several of the arguments that follow (discretionary performance by Lee, illusory contract, and Miller's right to a reasonable compensation) sound in the equitable remedy of quantum meruit, not in breach of contract.

In Plaintiff's Brief, filed June 18, 1979, he appears to abandon the contract cause of action altogether with the following introduction:

> In Defendant's most recent brief filed herein it has, in conformity with its past position, argued a case not before this Court. Defendant has argued that "harsh" contracts will not be equitably amended and that the Courts will not write "new contracts" for the parties. But as the Court pointed out in its examination of Defendant's attorney during oral argument, these are not Plaintiff's positions. Rather, Plaintiff has argued from the inception that the Salesmen's Agreement at issue here is not a contract at all because it fails for want of mutuality.

Plaintiff's Brief, filed June 18, 1979, p.1 (emphasis original).

The proposed Amended Complaint merely restates the cause of action on the contract. It would enlarge the allegations of bad faith, but would not add to a quantum meruit argument. The prayer for relief remains the same, on the same legal theories. The Amended Complaint does allege some new facts, and places a different emphasis on some facts already alleged, but as defendant argues, the Amended Complaint does not cure the defects of the original Complaint, as will be discussed below. The filing of the Amended Complaint would not change the decision reached by this Court. For that reason, plaintiff's Motion will be overruled.

II. Defendant's Motion to Dismiss, or for Summary Judgment

Because evidence has been submitted in the form of affidavits, this motion will be considered solely as one for Summary Judgment in accordance with Rule 12(b)(6), F.R.Civ.P.

In Redhouse v. Quality Ford Sales, Inc., 511 F.2d 230 (10th Cir. 1975) the Tenth Circuit Court of Appeals reiterated the following criteria in regard to motions for summary judgment.

> Summary judgment cannot be awarded when there exists a genuine issue as to a material fact. (Citations omitted). Summary judgment does not serve as a substitute for trial, nor can it be employed so as to require parties to litigate via affidavits. (Citations omitted). It is considered a drastic relief to be applied with caution. (Citations omitted). Pleadings, therefore, must be liberally construed in favor of the party opposing summary judgment. (Citations omitted). Appellate courts must consider factual inferences tending to show triable issues in a light most favorable to the existence of such issues. (Citations omitted).

511 F.2d at 234.

Plaintiff claims that he is entitled to additional compensation in two instances: first, the difference between the five percent allegedly due him and the three percent actually paid to him on the Halliburton account from December 7, 1977 to February 28, 1978; and second, five percent on all deliveries to Halliburton sixty days after Miller's termination on February 28, 1978.

A. Five Percent or Three Percent

Miller's contract with Lee authorized Lee to 1) name the commission to be paid to Miller, 2) to change that commission by giving Miller five days notice, but 3) such change in commission would not affect orders accepted by Lee on or before the date of commission change. (Contract. ¶9).

On June 2, 1977, Halliburton sent Lee a letter of intent to purchase 2,332 coveralls for a field test program, all of which were delivered by September, 1977. (Affidavit of William G. Gillespie, filed Sept. 19, 1978). Plaintiff

states that he was paid five percent for securing this order for the field test (Complaint, ¶4) and never alleges that he was not paid in full. The Court finds that Lee owes Miller nothing on the field test order from Halliburton.

On December 2, 1977, Lee informed Miller that it was reducing his commission from five percent to three percent. Under paragraph 9 of the Contract, this would take effect five days later, or December 7, 1977.

On December 5, 1977, Halliburton notified Lee of its intent to purchase approximately 49,000 pairs of the overalls approved in the field test. Halliburton authorized Lee to obtain sufficient material to furnish 6,000 suits by January 31, 1978, and 14,000 suits per month thereafter. (Letter from Halliburton, attached to Gillespie Affidavit, Sept. 19, 1978.) A notation from Lee is added at the bottom of the December 5th, 1977 Halliburton letter, stating:

> We are in agreement with the terms and conditions of this letter subject to the revised delivery schedule stated in my letter of December 12, 1977 and the emblem detail referred to in your letter of December 16, 1977 File #HR-90-77.
>
> _____
> Paul R. Enger, National Sales Mgr.
> The H. D. Lee Co., Inc.

The notation is initialed "P.A.E.", and handwritten beneath is the notation "copy returned 12/19/77". Defendant alleges that this is the date of acceptance, and plaintiff makes no contrary allegation as to the validity of those notations. Instead, plaintiff argues that legally the date of acceptance is the December 5, 1977 letter from Halliburton, which plaintiff terms a reduction to writing of an earlier oral agreement. See Plaintiff's Brief, filed Aug. 22, 1978, p.10. Plaintiff then argues that whether the Order is held to have occurred with the oral agreement in November, 1977, or the letter on December 5, 1977, it is clear that both occurred before the effective reduction of plaintiff's

commission on December 7, 1977. Plaintiff thus argues that Halliburton's order of overalls was an acceptance of an offer to sell by Lee, and further that Halliburton's act is the "acceptance" that entitles plaintiff to compensation.

But such is not the agreement between plaintiff and defendant. Their agreement is that plaintiff's entitlement to compensation vests when Lee accepts an order. The fact that other arguments can be made as to who offered and who accepted vis-a-vis Halliburton and defendant Lee is irrelevant; the issue is Lee's acceptance of an order to purchase overalls. Paragraph 9 of the Contract provides that changes in commission rates "...shall not affect orders accepted by the Company..." The issue is: which was the order from Halliburton for the 49,000 pairs of overalls--the November, 1977 oral agreement or the December 5, 1977 letter of intent to purchase, and based on that, when was Lee's acceptance? Accepting as true for purposes of this summary judgment plaintiff's allegations that the agreement was reached in November, 1977, and reduced to writing by the December 5, 1977 letter from Halliburton, and further accepting plaintiff's argument that Lee began acquiring materials in November, 1977 to produce the overalls for Halliburton, and that this acquisition amounted to Lee's concurrence in the agreement with Halliburton, the Court still must reject plaintiff's argument. Miller's Contract with Lee clearly states that the commission will vest on the acceptance of an order (Contract, ¶¶6 and 9), not on the entering of some other type of agreement, such as an agreement to purchase a certain number of custom-made overalls as in this case. The December 5, 1977 letter from Halliburton states:

> Effective January 1, 1978, we intend to start ordering our 1978 requirements, approximately 49,000 suits per the above specifications.

Halliburton Letter, p.1, para.2.

> From this letter of commitment, individual orders will be issued for each using Division and drop shipped as required. All of the ordering procedure has not been finalized at this time. We will inform you at a later date the back-up inventory requirements and other ordering procedures.

Id. para.4.

It is clear from the evidence before the Court that as of the Halliburton Letter of December 5, 1977, the orders had not been placed, and would not be placed until January 1, 1978. Lee's acceptance of orders of overalls could not occur, then, until after the December 7, 1977 reduction of plaintiff's commission to three percent. Plaintiff is thus not entitled to his requested difference between the three percent paid him after December 7, 1977, and the five percent paid him before that date.

B. The Commission After April 29, 1978

Paragraph 14 of the Contract provides, in pertinent part, that in the event of termination, Miller's commission account was to be credited with all orders shipped within sixty days of his termination, and further that Miller would receive no credit for any orders not shipped before termination which do not qualify under the foregoing provisions. Plaintiff claims that he is entitled to five percent on all sales to Halliburton regarding the December 5, 1977 letter of intent to purchase 49,000 pair of overalls. The Contract, however, calls for Miller to receive his current commission (three percent as of December 7, 1977) on orders shipped up to sixty days after Miller's termination on February 28, 1978, that is, April 29, 1978. Lee did not breach the Contract by failing to pay Miller for orders shipped after April 29, 1978.

C. Bad Faith

As to plaintiff's allegations of Lee's bad faith, the Court finds that all of them are actions that Lee was entitled to take. Plaintiff alleges that his termination was

in bad faith, and an attempt to escape paying his rightful commission. But plaintiff was paid his rightful commission as stated in the contract; Lee didn't escape anything. Paragraph 13 of the Contract states that either Miller or Lee could terminate the contract at any time by giving one week's notice. As discussed above, paragraph 14 described the commission due Miller on accepted orders when he terminated. Lee followed those provisions. As for the reassigning of the Halliburton account to the "house account", which plaintiff also alleges was an attempt to avoid paying his commission, the reassigning of accounts is reserved to Lee in paragraph 15, as follows, in pertinent part:

> The Company reserves to itself authority and jurisdiction over all its sales territories and accounts....The Company reserves the right to alter or re-assign the following:
> (a) Any or all sections of territories
> (b) Any or all accounts
> (c) Any or all commission arrangements

Again, Lee did what it was authorized to do under the Contract. The same is true for Lee's discontinuance of its "Lee Career Apparel" sales force--Lee did what it was entitled to do under the Contract. It is also true of plaintiff's allegation in his proposed Amended Complaint that "Lee knowingly and willfully took advantage of Miller by accepting the benefits of his efforts knowing that it would not adequately compensate him for those efforts." Plaintiff is trying to make an argument that defendant Lee did something wrong by doing something that is expressly authorized in the Contract.

Finally, plaintiff argues that:

> The agreement between the parties is silent, or at least not definitive, on the issue of the extent to which Miller is entitled to commissions, on sales subsequent to his termination of which he was the procuring cause prior to his termination, and therefore to that extent is ambiguous...

Complaint, para.9. Plaintiff then asks for five percent on all future deliveries to Halliburton. In that paragraph 14 of the Contract provides for a cessation of payment on

orders actually obtained by Miller, it is easily concluded that Miller's compensation does not include post-termination commission on orders he did not obtain, notwithstanding his being the "procuring cause".

III. Illusory Contract and Quantum Meruit

Although plaintiff has not properly pleaded a cause of action in quantum meruit, the Court will nonetheless consider that argument as put forth in plaintiff's subsequent pleadings.

The Court must now look to the provisions of state law vis-a-vis quantum meruit. Defendant Leè urges that Kansas law is applicable by operation of Paragraph 20 of the parties' agreement, which calls for "construction in accordance with the laws of the State of Kansas, and for the purpose of all legal proceedings this contract shall be deemed to have been performed in the said state..." Defendant has introduced no other evidence and made no other allegations to warrant the application of Kansas law.

The Court is faced with an alleged contract between an Oklahoma resident and a Delaware corporation with its principal place of business in Kansas. There are no allegations as to where the contract was signed. According to plaintiff, the work was to be performed in part in Oklahoma, and the activities forming the basis of this action occurred in Oklahoma. The contractual directive that Kansas law be applied is valid only if the Agreement is valid, and that has yet to be determined for purposes of the quantum meruit argument. With no evidence compelling the application of Kansas other than Paragraph 20, Oklahoma law will be applied to test the validity of the Agreement.

Title 15, Okla.Stat.Annot. §112 states:

> When a contract does not determine the amount of the consideration, nor the method

> by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party, the consideration must be as much money as the object of the contract is reasonably worth.

The Contract in this case provided that the consideration would be a commission to be named by defendant, and would be subject to change by defendant. While Oklahoma law provides that prior oral agreements do not vary the terms of a written agreement (Title 15, Okla.Stat.Annot. §137), Oklahoma law also provides that subsequent oral modifications that are fully performed can vary the written agreement. Bredouw v. Wilson, 208 Okla. 393, 256 P.2d 421 (1953); Minnehoma Oil Co. v. Koons, 99 Okla. 266, 226 P. 1048 (1924). It should be noted that the parties' oral agreement for Miller to receive a five percent commission, whether prior, contemporaneous, or subsequent to the written agreement, does not vary the terms of the agreement; it only supplements the agreement's Paragraph 9 provision that leaves the amount of commission open.

The Oklahoma Supreme Court has stated:

> When the writing does not purport to disclose the complete contract, or if, when read in the light of attendant facts and circumstances, it is apparent that it contains only a part of the agreement entered into by the parties, parol evidence is admissible to show what the rest of the agreement was; but such parol evidence must not be inconsistent with or repugnant to the intention of the parties as shown by the written instrument, for, where a contract rests partly in parol, that part which is in writing is not to be contradicted."

Ross v. Stricker, 275 P.2d 991, 994 (Okla. 1953), quoting Holmes v. Evans, 29 Okla. 373, 118 P. 144, 146 (1911).

> The existence of a written contract of employment does not preclude the admission of parol evidence of prior or contemporaneous collateral agreements between the employer and employee, which are not inconsistent with, or contradictory of, and do not vary or change the writing, and which relate to a matter as to which the writing is silent, where the writing is incomplete or expressly refers to extrinsic agreements without stating them.

Id. at 995, quoting 32 C.J.S. Evidence, §1003 (emphasis original).

In this case, the evidence is clear that Lee and Miller orally agreed to a five percent commission as Miller's consideration. Had Lee offered an unreasonably small commission to Miller after he signed the written agreement, Miller simply could have refused and ended the association. The Contract made Miller aware that Lee reserved the right to rename the commission, that is, to renegotiate the contract. If Lee should do so, Miller had the right not to accept the new consideration. Under the terms of the Contract, Miller would still receive all the previously agreed to consideration on all orders thus far accepted by Lee. Miller was aware that in order to be paid, no matter what the consideration, an order had to be accepted and shipped; that if any items were rejected or returned, his account would be reduced; and that if he left, he would not be paid for any orders shipped sixty days after his leaving.

Thus, the agreement between Miller and Lee was not silent as to Miller's commission. It should be noted that the 5% commission that Lee named and Miller agreed to was not a separate agreement--it was completion of the agreement that was contemplated in the Contract. It should also be noted that Title 15 Okla.Stat.Annot. §112 is not applicable because this Contract 1) did ascertain the method by which consideration was to be ascertained--the amount named by Lee and agreed to by Miller, and 2) did not leave the amount of consideration to Lee's discretion--Lee named the consideration before Miller began to sell Lee's products, not afterward. Miller had the right not to accept the commission rate named by Lee by quitting.

When Lee reduced Miller's commission to three percent after he had already done most of the work (assuming Miller's allegations are true) in securing the Halliburton account, Miller faced something that he knew could happen. He knew

that he wouldn't get paid the five percent commission if 1) Halliburton did not order the overalls, or 2) if the Halliburton account were reassigned to the Lee "House account", or 3) if he quit or was fired and the overalls were shipped later than sixty days after his termination, or 4) if his contract were renegotiated, as it was. Miller's Contract with Lee was not to pay him an undetermined amount; it was to pay Miller five percent as per the agreement of the parties. When Lee decided to renegotiate the commission by offering Miller three percent, for which he could refuse to continue selling for them, Lee's obligation to pay Miller at five percent was fixed on those things already accepted by Lee. When Miller decided not to accept a reassignment and instead to quit (or even if Lee fired him) Miller faced the added provision of the Contract that he would now be paid only for those things ordered, accepted, and shipped not later than sixty days after his leaving. The fact that this is not as much consideration as Miller aspired to is irrelevant. The important thing is that it was the consideration spelled out in the parties' agreement.

The fact that Miller would enter such an agreement in speculation that he would make a certain income, or that Miller after entering the agreement would anticipate the Halliburton account would make him a certain income, is not for the Court to inquire into. He did enter the agreement with Lee, and the terms were express, including the fact that their orally supplemented commission agreement was subject to revision (but only as to commissions not vested by Lee's having accepted the order). The very nature of this Contract is that it is speculative, both as to the making of sales and the company's change of policies or assignments; the latter is expressly spelled out in the Contract, paragraph 15.

Another factor to be considered is whether Lee's performance was optional or was merely affected by conditions

subsequent.

Restatement, Contracts, §2, comment 'b' states:

> An apparent promise which according to its terms makes performance optional with the promisor whatever may happen, or whatever course of conduct in other respects he may pursue, is in fact no promise, although often called an illusory promise. (emphasis added).

In his treatise on contracts, Williston states:

> An apparent promise which, according to its terms, makes performance optional with the promisor whatever may happen, or whatever course of conduct in other respects he may pursue, is in fact no promise. Such an expression is often called an illusory promise.

Williston on Contracts, §1A, p.4, Vol. I (1936). And Corbin notes the following on illusory promises:

> By the phrase "illusory promise" is meant words in promissory form that promise nothing; they do not purport to put any limitation on the freedom of the alleged promisor, but leave his future action subject to his own future will, just as it would have been had he said no words at all...
>
> This is true even though the other promisor in fact bargains for a mere illusory promise in return and gets it...

Corbin on Contracts §145 pp.627-633 (emphasis added).

In the instant case, performance is not optional with Lee. Under the definition in Restatement, Contracts §2, supra, Lee may not refuse to pay "whatever may happen, or whatever course of conduct in other respects he may pursue". If plaintiff were to obtain a purchase order for Lee's product, and Lee were to accept that order (which Lee must do to make money), Lee is obligated to pay Miller the agreed commission upon shipment unless the order is cancelled or Miller resigns or is fired more than sixty days prior to shipment. If any items are returned by the purchaser, Miller forfeits that portion of the commission. If these conditions subsequent (cancellation of the purchase or Miller's termination) do not happen, Lee is obligated to pay Miller. The fact that Lee exercises some control over the

conditions subsequent, such as choosing the shipping date, does not make this an illusory contract. The ways in which Lee can avoid paying its salesmen may make this a bad contract, but it is still a contract--one that this Court may not interfere with or rewrite.

Finally the Court would note the misapplication of the theory of illusory contract in this case, as defendant noted in its Brief in Response, filed July 3, 1979, pp. 2-3. Even if plaintiff had established that Lee's promise was illusory, he would not be entitled to the remedy he sought. Corbin states:

> As a matter of course, no action will lie against the party making the illusory promise. Having made no promise it is not possible for him to be guilty of a breach. Generally, the suit is against the party who really made a promise and the problem is as to the existence of sufficient consideration.

Corbin on Contracts, § 145. See also Corbin, § 201.

However, plaintiff's other arguments as to quantum meruit, including the one based on Title 15 Okla. Stat. Annot. §112, did cause the Court to give full consideration to plaintiff's entitlement to a reasonable value for his services in place of the bargained for consideration, notwithstanding the misuse of the illusory contract theory.

For the foregoing reasons, plaintiff's Motion for Leave to File Amended Complaint is overruled, and defendant's Motion for Summary Judgment is sustained.

It is so Ordered this 23rd day of June, 1980.

H. DALE COOK
Chief Judge, U.S. District Court

United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 79-C-438-E

CHARLES GOLDEN,
Plaintiff,

vs.

GULF OIL CORPORATION,
Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable James O. Ellison, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the Plaintiff.

It is Ordered and Adjudged that having found in favor of the Plaintiff and against the Defendant assesses damages in the sum of $12,000.00, and Plaintiff be awarded his cost of action.

FILED

JUN 24 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Dated at Tulsa, Oklahoma, this 24th day of June, 1980.

Clerk of Court

United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 79-C-517-BT

Melvin Lewis Taylor,

Plaintiff,

vs.

Bill McEntire, Orlin White, Tony Smith, Calvin Tate and Kenneth Bailes,

Defendants.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Thomas R. Brett, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the defendants.

It is Ordered and Adjudged that the plaintiff take nothing and that the defendants recover of the plaintiff its costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that the jury, duly empanelled, finds the issues in favor of the plaintiff and against the defendant, Kenneth Bailes, on the counterclaim of Kenneth Bailes.

Dated at Tulsa, Oklahoma, this 24th day of June, 19 80.

Thomas R. Brett
United States District Judge

Clerk of Court
Jack C. Silver

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS,

Plaintiff,

-vs-

HODGES WAREHOUSE, A Division of Port City Properties, Inc.,

Defendant.

No. 80-C-198-B

DEFAULT JUDGMENT

This matter comes on for consideration this 23rd day of June, 1980, the Plaintiff appearing by Michael J. Wigton, Attorney for the Plaintiff, and the Defendant, Hodges Warehouse, a Division of Port City Properties, Inc., appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Hodges Warehouse, a Division of Port City Properties, Inc., was personally served with Summons and Complaint on April 14, 1980, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Hodges Warehouse, a Division of Port City Properties, Inc., for the sum of $6,516.26, plus interest at the legal rate of 10% per annum from February 26, 1980 until this Judgment is paid, plus an attorney's fee of $1,750.00, plus costs in the sum of $68.16.

Thomas R. Brett
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JERRY A. TAYLOR, Plaintiff, v. T K INTERNATIONAL, Defendant.	)	No. 79-C-185-BT

ORDER

This cause having come before the Court on the request by Plaintiff that this cause be dismissed, with prejudice, and the Court having considered same, and being fully advised in the premises, it is, therefore,

ORDERED that this cause be dismissed, with prejudice. Each party to bear its own costs.

Thomas R. Brett
U. S. District Court Judge

Dated this 23 day of June, 1980.

AILEEN LAVERNE HOFF,

Plaintiff,

vs.

GOLDEN BROTHERS, INC. and STEPHEN L. STEELMAN,

Defendants.

No. 80-C-95-C

Filed
6-23-80
Jack C. Silver, Clerk
U. S. Dist. Court

JUDGMENT

On the 16th day of June, 1980, the above entitled cause came on for hearing on its merits. The Plaintiff appeared in person and with her attorney, C. Rabon Martin. The Defendant appeared by its employee Stephen L. Steelman and by its attorney, Dan Roger[illegible]. The parties announced ready and a jury of six (6) was duly empaneled and sworn. The Plaintiff presented her evidence and rested, whereupon, the trial was adjourned to following day.

On the 17th day of June, 1980 the trial resumed, with the Defendant presenting its evidence and resting. There was no rebuttal. Both parties presented arguments of counsel, following which the jury was instructed by the Court. Following deliberations, the jury returned a unanimous verdict finding the Plaintiff [illegible]% negligent and the Defendant Steelman 80% negligent, and assessing Plaintiff's damages at $75,000.00, resulting in a net recovery for the Plaintiff of $60,000.00. Pre-judgment at 10% per annum was added pursuant to 12 O.S. § 727, yielding a total recovery for the Plaintiff of $62,284.88.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff Aileen Laverne Hoff have and recover judgment against the Defendants Golden Brother, Inc. and Stephen L. Steelman, in the sum of $62,284.88, together with her costs expended herein.

Entered this ____ day of June, 1980.

s/H. DALE COOK

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 80-C-155-C
DALE G. PETERSON, Defendant.	)	

ORDER OF DISMISSAL

NOW, on this 20th day of June, 1980, there came on for consideration the Notice of Dismissal filed herein by the Plaintiff, United States of America. The Court finds this action, based on such Notice of Dismissal, should be dismissed, with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this action be and the same is hereby dismissed, with prejudice.

(Signed) H. Dale Cook
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THE PAGE MILK COMPANY, Plaintiff,	)	
v.	)	No. 77-C-315-CE
FOREMOST-McKESSON, INC., Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

On this 20 day of June, 1980, the joint stipulation of dismissal with prejudice of the parties being presented to the Court and with good cause being shown, it is hereby

ORDERED, ADJUDGED and DECREED that the above-styled action is hereby dismissed with prejudice and each party is to bear its own costs.

James O. Ellison
UNITED STATES DISTRICT JUDGE

DATED: June 20, 1980

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. LUCIOUS D. HIRIAMS, Defendant.	)	CIVIL ACTION NO. 80-C-271-C

DEFAULT JUDGMENT

This matter comes on for consideration this 19th day of June, 1980, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Lucious D. Hiriams, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Lucious D. Hiriams, was personally served with Summons and Complaint on May 13, 1980, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Lucious D. Hiriams, for the principal sum of $998.50, plus interest at the legal rate from the date of this Judgment until paid.

(Signed) H. Dale Cook
H. DALE COOK
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SANDRA FAYE BIBLE, Plaintiff,	)	
vs.	)	CIVIL Case No. 79-C-615-BT
THE UNITED STATES OF AMERICA, Defendant.	)	

ORDER OF DISMISSAL

It appearing to the Court counsel for the plaintiff has been unable to locate and determine the whereabouts of the plaintiff, and that plaintiff has failed to respond to the discovery requests of the defendant, the Court concludes this case should be dismissed for failure to prosecute.

IT IS THEREFORE ORDERED this matter is hereby dismissed for want of prosecution.

ENTERED this 19 day of June, 1980.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

1A

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
DIANE R. PRICE, Defendant.	)	CIVIL ACTION NO. 80-C-282-B

DEFAULT JUDGMENT

This matter comes on for consideration this 19th day of June, 1980, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Diane R. Price, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Diane R. Price, was personally served with Summons and Complaint on May 20, 1980, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Diane R. Price, for the principal sum of $834.34, plus the accrued interest of $184.12, as of April 30, 1980, plus interest at 7% from April 30, 1980, until the date of Judgment, plus interest at the legal rate on the principal sum of $834.34, from the date of Judgment until paid.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHRIS HOOPER,)
)
Plaintiff,)
)
vs.) No. 79-C-624-BT
)
REGENCY OLDSMOBILE,)
)
Defendant.)

J U D G M E N T

Based on the Findings of Fact and Conclusions of Law filed this date, IT IS ORDERED judgment be entered in favor of the defendant, Regency Oldsmobile, and against the plaintiff, Chris Hooper.

ENTERED this 19 day of June, 1980.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHRIS HOOPER,)
)
Plaintiff,)
)
vs.) No. 79-C-624-BT
)
REGENCY OLDSMOBILE,)
)
Defendant.)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The defendant, Regency Oldsmobile, has filed a Motion for Summary Judgment pursuant to Rule 56, F.R.Civ.P., and has submitted, in addition to briefs, an affidavit and excerpts from sworn testimony contained in depositions, in support of said Motion. The plaintiff, Chris Hooper, has filed his responsive brief. Plaintiff has not submitted any affidavits, but in his brief refers generally to depositions on file. The parties have not requested oral argument and a review of the file establishes no need for oral argument. The Court has reviewed the entire file, including depositions, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff purchased a 1977 Oldsmobile Cutlass 44 automobile from defendant on May 19, 1979, for a total price of $5,200.00.

2. The mileage on the odometer at the time defendant purchased the vehicle was 34,599. (Affidavit of Russ Anderson.)

3. At the time plaintiff purchased the vehicle the odometer showed mileage of 34,618. (Pl. Dep. 15-16).

4. In June of 1979, plaintiff called a former owner, Jeff Farris, who told plaintiff the vehicle had something in excess of 60,000 miles on the car when he owned it. (Pl.Dep.13-14)

5. The basis of plaintiff's allegation that defendant altered the odometer was based on his conversation with the owner, but plaintiff has no independent knowledge as to who altered the odometer or that Regency Oldsmobile knew or had any basis to believe the odometer had been altered. (Pl. Dep.17-18).

6. Plaintiff considered the mileage of 34,618 on the vehicle when he purchased it to be average. (Pl. Dep. 16).

7. Jeff Farris purchased the 1977 Oldsmobile Cutlass 44 automobile used from Dean Bailey Oldsmobile on April 27, 1979 (Farris Dep.4-5, 7). The odometer reading when he purchased the car was 60,546. (Farris Dep.6-7).

8. He paid $3,300.00 cash and purchased the vehicle in the name of Hunter Motor Company [a name he uses when he sometimes purchased cars wholesale and resold them--Mr. Farris was not in the used car business as such]. (Farris Dep.9).

9. He owned the vehicle just a few days prior to selling it because he needed money. (Farris Dep.7; Wallace Dep. 6).

10. Farris loaned the 1977 Oldsmobile Cutlass vehicle he owned to a friend. When the friend returned the car he told Farris the odometer had been broken and repaired. (Farris Dep. 10).

11. Farris looked at the odometer to see if it had been fixed, but did not notice the mileage on the odometer or whether the odometer had been altered as to mileage. (Farris Dep. 11, 12).

12. Farris stated the odometer could have been altered "when it got jarred." (Farris Dep. 28).

13. Farris had a friend, Wally Wallace, sell the vehicle for him. (Farris Dep. 7).

14. Farris never talked to anyone at Regency Oldsmobile concerning the car. (Farris Dep. 12, 13).

15. Mr. Wallace took the car to Regency Oldsmobile because he knew Russ Anderson, a salesman for Regency, and had purchased cars from him [Wallace had a used car license issued by the State of Oklahoma (47 O.S. §22.15A)]but this was the first car he sold to him. (Wallace Dep. 14, 15).

16. Russ Anderson filled out the odometer statement and Wallace signed it. (Wallace Dep. 7, 8).

17. Wallace had not looked at the odometer reading. (Wallace Dep. 8)

18. Anderson purchased the car for $4,400.00. (Wallace Dep. 9).

19. Russ Anderson, the Regency Oldsmobile salesman, did not know the odometer had been altered prior to the institution of this lawsuit. (Anderson Affidavit).

20. The record in this case is silent concerning the original ownership of the 1977 Oldsmobile Cutlass 44 automobile prior to its sale to Dean Bailey Oldsmobile (an Oldsmobile dealer in Tulsa, Oklahoma). The record does reveal the following partial chain of ownership pertinent to this litigation:

> Dean Bailey Oldsmobile sold the vehicle to Jeff Farris on April 27, 1979 and the odometer reflected mileage of 60,546.
>
> Jeff Farris kept the vehicle a few days. During his ownership he loaned it to a friend who broke the odometer and had it repaired.
>
> Jeff Farris gave the vehicle to a friend, Wally Wallace, to sell for him.
>
> Wally Wallace took it to defendant's salesman, Russ Anderson, who purchased the vehicle and filled out the odometer statement for Wallace to sign. At the time Anderson checked the odometer, it reflected mileage of 34,599.
>
> Plaintiff purchased the vehicle from defendant on May 19, 1979. At the time plaintiff purchased the vehicle the odometer showed 34,618.

21. The parties have stipulated there is no evidence to indicate the defendant actually engaged in the alteration of the odometer in question. (Order of March 18, 1980).

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. This Court has jurisdiction of the subject matter and the parties. 15 U.S.C. §1989(b).

2. The cases relied on by plaintiff in support of his position that a defendant who lacked actual knowledge may still be found to have intended to defraud and be civilly liable for failure to disclose a vehicle's actual mileage is unknown are distinguishable. In Nieto v. Pence, 578 F2d 640 (5th Cir. 1978), the vehicle was a 10 year old truck with 14,000 miles. The defendant in that case admitted he would be suspicious of such a reading [defendant had been in the auto business for some 12 years]. In Bolton v. Tyler Lincoln-Mercury, Inc., 587 F2d 796 (5th Cir. 1979), the original owner had

purchased the vehicle new from the defendant; he had had the car serviced by defendant; defendant knew the original owner's driving habits; the car was originally purchased on September 17, 1975, and was serviced on October 2, 1975, with 1,404 miles on the odometer; defendants serviced the car on October 17 and November 10, 1975, and the odometer read 2,695 miles and 4,301 miles, respectively; there was a service sticker on the car that showed in August 1976 the car had more than 29,000 miles on it; and the car was sold by defendant to the plaintiff on October 11, 1976, with the odometer showing 12,250 miles.

3. There is no evidence in the record defendant had knowledge of the tampered odometer prior to plaintiff's purchase.

4. There is no evidence in the record to justify an inference defendant had any intent to defraud.

5. Section 1989 makes it clear that a mere negligent violation does not give rise to a cause of action. Pepp v. Superior Pontiac GMC, Inc., 412 F.Supp. 1053 (USDC ED La. 1976); Hill v. Bergeron Plymouth Chrysler, Inc., et al., 546 F.Supp. 417 (USDC ED La. 1978).

6. The burden is upon the plaintiff to establish the defendant acted with the intent to defraud and intent to defraud under §1989 cannot be presumed although it can be inferred from surrounding facts. Clayton v. McCary, 426 F. Supp. 248 (USDC Ohio 1976).

7. Rule 56(c), F.R.Civ.P. provides:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

8. In Hill v. Bergeron Plymouth Chrysler, Inc., supra, it was said:

> "The Court recognizes that issues of intent and negligence are generally not appropriate for resolution by summary judgment. However, in clear cases when the plaintiff has totally failed to produce any evidence of intent, and it appears that plaintiff could not under any circumstances produce such evidence, summary judgment is a viable means for the swift conclusion of this part of the litigation."

This case sought to impose liability under 15 U.S.C. §1989.

9. The Court finds there is no genuine issue of any material fact and Summary Judgment should be entered in favor of the defendant and against the plaintiff.

10. The Court, therefore, finds defendant's Motion for Summary Judgment should be sustained.

IT IS, THEREFORE, ORDERED defendant's Motion for Summary Judgment be and the same is hereby sustained.

ENTERED this 19 day of June, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 77-C-311-E

WESLEY S. WALKER, JR.,
Plaintiff,

vs.

ORKIN EXTERMINATING COMPANY, INC.,
Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable James O. Ellison, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the Defendant.

It is Ordered and Adjudged that the Plaintiff take nothing and that the Defendant recover of the Plaintiff their costs of action.

FILED

JUN 19 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Dated at Tulsa, Oklahoma, this 19th day of June, 1980.

Clerk of Court

54

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HI-PERFORMANCE MARINE, INC., Plaintiff,	)	
vs.	)	No. 77-C-24-BT
CHARLES MEUCHE and DONALD C. MONNIER, dba M & M MARINE and M & M MARINE, INC., Defendants.	)	

J U D G M E N T

In accordance with the Findings of Fact and Conclusions of Law filed on this 18 day of June, 1980, judgment is hereby granted to defendants on plaintiff's claim and to plaintiff on defendant's counterclaim. Each party is to bear its own costs.

DATED this 18 day of June, 1980.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HI-PERFORMANCE MARINE, INC., Plaintiff,	)	
vs.	)	No. 77-C-24-BT
CHARLES MEUCHE and DONALD C. MONNIER, dba M & M MARINE and M & M MARINE, INC., Defendants.	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came on for trial on the issue of liability on the 28th day of April, 1980, before the undersigned United States District Judge. Plaintiff appeared by and through counsel, Bill V. Wilkinson, and defendants appeared by and through their counsel, Arthur A. Ames and James C. Lang. The Court having duly considered the evidence and arguments of counsel and being fully advised in the premises, now finds as follows:

FINDINGS OF FACT

1. Plaintiff, Hi-Performance Marine, Inc., is a corporation incorporated under the laws of the State of Oklahoma, having its principal place of business in the State of Oklahoma. Defendants, Charles Meuche and Donald C. Monnier, are residents of the State of Ohio, and M & M Marine, Inc., is a corporation incorporated under the laws of Ohio, having its principal place of business in the State of Ohio. Defendants have transacted business in the State of Oklahoma in connection with the controversy herein. The amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

2. On October 17, 1974, plaintiff and defendant, M & M Marine, Inc., entered into a written franchise agreement whereby defendant became a distributor of Taylor Boats manufactured by plaintiff.

3. The franchise agreement granted to defendant the exclusive right to sell Taylor Boats within a territory consisting of twenty (20) states in the Northeastern and Eastern United States.

4. The agreement also provided that "Franchisee hereby agrees to purchase from Franchisor not less than ten boats per calendar month." Implied by this term is a reciprocal obligation on the part of plaintiff to furnish ten boats per month as ordered.

5. The purpose of the ten boat per month requirement was to assure plaintiff a constant production of boats throughout the year, and to assure defendant a minimum number of boats for the franchised area. Demand for boats is seasonal, with the greatest demand being in the spring and summer months.

6. Plaintiff produced approximately one boat per day (22 working days per month) through the first half of 1975. Production increased to almost two boats per day in the latter part of 1975 and 1976. This production was not maintained in early 1976 because of personal problems between the production manager and Oscar Taylor, principal owner.

7. M & M Marine, Inc., was operated as a part-time business, and both Charles Meuche and Donald C. Monnier were regularly employed in other lines of work. This part-time business had limited financial ability to inventory boats,and at least to some extent, was unable to purchase boats without previous orders from its dealers.

8. Boat orders were placed either by telephone or by written order on forms supplied by plaintiff. When boats were ordered by telephone, the forms were completed by plaintiff's personnel.

9. Neither party maintained accurate records of the number of boats ordered.

(a) Plaintiff's only records of orders placed are order forms,which admittedly were not complete.

(b) Plaintiff's invoices show only boats actually delivered.

(c) Defendants had no records at all except cancelled checks showing payments made.

10. From the beginning, neither party adhered to the ten boat per month contract provision. Defendant did not order or purchase ten boats per month in the winter or off-season months, and plaintiff was unable to furnish ten boats per month during the spring and summer months because of high demand and production limitations.

11. Although defendants did not order ten boats per month from the beginning, plaintiff never asked nor demanded compliance with the contract provision. By not demanding performance of the quantity provision over a long period of time, while knowing what the contract called for, plaintiff waived performance of that provision.

12. In the late summer of 1975, the parties agreed orally that the defendant would get the same percentage of the plaintiff's total boat production in the boating season (spring and summer) as it took in the off-season (fall and winter), thereby achieving a more equitable balance.

13. In March 1976, the parties discussed that defendants would receive twenty boats per month beginning at that time. Defendants were to furnish specifications for the boats with a two-week lead time. There is no evidence that such specifications were furnished for twenty boats per month.

14. Neither of these agreements in Paragraphs 12 or 13 was adhered to by either party.

15. There were occasions when plaintiff diverted boats being built for defendants to its other distributor located in Duncan, Oklahoma.

16. Defendants experienced some problems with the quality of the boats delivered to them. However, these problems were resolved by plaintiff by way of credits and other adjustments.

17. The acts and conduct of both parties show that neither party intended to be bound by the ten boat per month requirement. At the same time, the conduct of the parties indicates that both desired to continue the franchise relationship without strict boat purchase requirements until the time of termination by plaintiff.

18. On December 13, 1976, plaintiff terminated the franchise agreement by telegram and letter, specifying violation of Paragraphs 2(a) and 5. Paragraph 2(a) reads:

> "2. WARRANTIES OF FRANCHISEE
>
> The Franchisee warrants:
>
> (a) To work and develop the Territory as a market for the Products to the satisfaction of the Franchisor." (Emphasis supplied)

Paragraph 5 contains the provision that Franchisee is to purchase ten boats per month.

The last sentence of Paragraph 7 allows Franchisor to terminate the agreement "should Franchisee fail to fulfill or comply with any of the terms, conditions, agreements, or covenants of this franchisee agreement."

19. On December 18, 1976, a distributorship agreement was entered into between plaintiff and Wayne Kimmel and Jerry Black, former employees of the defendant, M & M Marine.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter in this action by reason of diversity of citizenship. 28 U.S.C. §1332.

2. Any of the Findings of Fact above which could also be characterized as Conclusions of Law are incorporated herein.

3. Defendants, by not ordering ten boats per month, breached the franchise agreement.

4. However, plaintiff by its conduct waived the ten boat per month requirement. It would be inequitable to allow plaintiff to assert a breach by defendant after it has conducted itself for more than two years as though the quantity requirement did not exist. Campbell v. Frye, 292 P.7 (Okl.1930) "A party to a written contract who intends to assert a breach of terms thereof must act in such a reasonable manner as to inform the adverse party of the intended claim of such breach." Spurgin v. Bennett, 168 P2d 134 (Okl.1946) cited in Oklahoma State Fair Exposition v. Lippert Bros., 243 F2d 290 (10th Cir. 1957).

5. Defendants' obligation to purchase ten boats per month, when considered along with the procedure established for ordering specific boats, constitutes a condition precedent to performance by plaintiff of its obligation to sell ten boats per month.

6. In order for defendants to prevail on their counterclaim, they must have first placed orders for ten boats per month, thus performing the condition precedent. Since the condition precedent was not performed, defendants cannot prevail on their claim. Owens v. Automotive Engineers, 255 P2d 240 (Okl. 1953); Anderson v. Pickering, 541 P2d 1361 (Okl.App. 1975).

7. The evidence was insufficient to establish the alleged conspiracy between plaintiff and Wayne Kimmel and Jerry Black to terminate the contract between plaintiff and defendants.

8. Plaintiff was entitled to cancel the agreement based on Paragraphs 2(a) and 7. The clear and unambiguous language of the contract does not require that plaintiff's dissatisfaction be reasonable. Paul Hardeman, Inc. v. United States Fidelity & Guaranty Company, 486 P2d 726 (Okl. 1971).

9. A judgment in keeping with the Court's conclusion neither party is entitled to recover against the other should be filed herewith.

DATED this 18th day of June, 1980.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MILTON M. MOORE and SUE KENDALL MOORE, Plaintiffs,	)	
vs.	)	No. 76-C-192-C
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., a corporation, and CHUCK BULAND, an individual, Defendants.	)	

ORDER OF DISMISSAL

UPON the Parties' Joint Stipulation for Dismissal, filed herein on June 12, 1980,

IT IS HEREBY ORDERED that the captioned case, the Plaintiffs' Amended Complaint, and all claims for relief that have been or could ever be based thereon, are dismissed with prejudice with each side to bear its own costs and attorneys' fees.

DATED this 17 day of June, 1980.

(Signed) H. Dale Cook

Chief United States District Judge

13.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 17 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
JERRY M. HOLT,	)	CIVIL ACTION NO. 80-C-144-E
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 17th day of June, 1980, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Jerry M. Holt, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Jerry M. Holt, was personally served with Summons and Complaint on April 15, 1980, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Jerry M. Holt, for the principal sum of $1,007.88, plus interest at the legal rate from the date of this Judgment until paid.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ELLEN KIRTLEY and LOUIS KIRTLEY, Plaintiffs,	)	
V.	)	CIVIL CASE NUMBER 79-C-727-BT
K-MART CORPORATION, Defendant.	)	

ORDER

By Memorandum filed June 11, 1980, plaintiff, Louis Kirtley, abandoned his claim for loss of consortium.

IT IS, THEREFORE, ORDERED the claim of Louis Kirtley for loss of consortium is hereby dismissed.

ENTERED this 16th day of June, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT ON JURY VERDICT CIV 31 (7-63)

United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 79-C-727-BT

Ellen Kirtley, Plaintiff,

vs.

K-Mart Corporation, Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable THOMAS R. BRETT, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the Defendant.

It is Ordered and Adjudged that the plaintiff take nothing and that the defendant, K-Mart Corporation, recover of the plaintiff, Ellen Kirtley, its costs of action.

FILED
JUN 16 1980
Jack C. Silver, Clerk
U. S. DISTRICT COURT

Dated at Tulsa, Oklahoma, this 16th day of June, 1980.

Thomas R. Brett
United States District Judge

Clerk of Court
Jack C. Silver

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 16 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

WENDY WALLS, A Minor by BRUCE GAITHER, Next Friend,

Plaintiff,

vs.

NORTH AMERICAN VAN LINES, INC., A Corporation, and DUANE S. WILSON,

Defendants.

NO. 79-C-516-C

ORDER OF DISMISSAL

ON THIS 16th day of June, 1980, upon the written application of the parties for a Dismissal with Prejudice of the Complaint, Complaint of Intervenors and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and Complaint of Intervenors and have requested the Court to dismiss said Complaint and Complaint of Intervenors with prejudice. The Court further finds that the following sums are being paid to the parents of the minor plaintiffs, for medical expenses and for and on behalf of the following minors, to-wit:

a. ONE THOUSAND FIVE HUNDRED FIFTY AND 00/100 DOLLARS ($1550.00) to Georgia Ann Durham.

b. ONE THOUSAND SIX HUNDRED AND 00/100 DOLLARS ($1600.00) to Georgia Ann Durham on behalf of Kari Durham.

c. ONE THOUSAND SIX HUNDRED AND 00/100 DOLLARS ($1600.00) to Georgia Ann Durham on behalf of Angie Durham.

d. FOUR THOUSAND TWO HUNDRED AND FIFTY AND 00/100 DOLLARS ($4250.00) to Valerie Walls.

e. FIVE THOUSAND FIVE HUNDRED AND 00/100 DOLLARS ($5500.00) to Valerie Walls on behalf of Wendy Walls.

f. FIVE HUNDRED AND 00/100 DOLLARS ($500.00) to Valerie Walls on behalf of Brad Walls.

THE COURT FURTHER FINDS that none of the above sums is more than NINE HUNDRED DOLLARS ($900.00) over and above actual expenses involved. The Court being fully advised in the premises, further finds that said Complaint and Complaint of Intervenors should be dismissed pursuant to said application.

THE COURT FURTHER FINDS that any and all rights, causes of action and/or relief of any kind which Kari Durham and Angie Durham may have now or in the future against any and all other persons, including Valerie Walls, her agents, servants or representatives, are specifically reserved.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and Complaint of Intervenors and all causes of action of the plaintiffs and intervenors filed herein against the defendents be and the same hereby are dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that any and all rights, causes of action and/or relief of any kind which Kari Durham and Angie Durham may have now or in the future against any and all other persons, including Valerie Walls, her agents, servants or representatives, are specifically reserved.

S/ JAMES O. ELLISON

JUDGE, UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

APPROVALS:

JACK I. GAITHER,

Attorney for the Plaintiffs,

ALFRED B. KNIGHT,

Attorney for the Defendants.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

OWEN GEORGE SHORT, Plaintiff,	)	
vs	)	No. 79-C-436-C
T. JACK GRAVES, et al, Defendants.	)	

FILED
IN OPEN COURT

JUN 16 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

PLAINTIFF'S MOTION TO DISMISS

Comes now the plaintiff above named, by and through his attorney, Michael L. Fought, and moves to dismiss the above entitled action as against Defendants Glen "Pete" Weaver and Al Boyer with prejudice against refiling.

Michael L. Fought
Attorney for Plaintiff

ORDER

Now on this 16th day of June, the matter having been brought before the Court upon the Motion of the Plaintiff to Dismiss, it is hereby ordered, adjudged and decreed that the above entitled action be dismissed with prejudice against refiling of same.

H. Dale Cook
United States District
Judge

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the above and foregoing motion and order upon Tony Jack Lyons, Counsel for Defendants, by personal delivery on the _____ day of June, 1980.

Michael L. Fought

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 16 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID R. LITTLEJOHN a/k/a DAVID LITTLEJOHN, Defendant.	)	CIVIL ACTION NO. 79-C-427-E

DEFAULT JUDGMENT

This matter comes on for consideration this 16TH day of June, 1980, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, David R. Littlejohn a/k/a David Littlejohn, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, David R. Littlejohn a/k/a David Littlejohn, was personally served with Summons and Complaint on January 3, 1980, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, David R. littlejohn a/k/a David Littlejohn, for the principal sum of $807.50 plus the accrued interest of $134.11 as of April 25, 1979, less the sum of $20.00 which has been paid, plus interest at 7% from April 25, 1979, until the date of Judgment, plus interest at the legal rate on the principal sum of $807.50 from the date of Judgment until pai

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 17 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

CLYDE J. COUNTER,

Plaintiff,

vs.

GATE CITY STEEL CORPORATION and JIM HARVEY,

Defendants.

No. 79-C-233-E

ORDER OF DISMISSAL

NOW on this 17TH day of June, 1980, the plaintiff by and through his attorney, H. Richard Raskin, having advised the Court that he desires the captioned cause be dismissed and the Court, having reviewed the pleadings and heard the statements of counsel and being fully advised in the premises, finds as follows:

1. That this action was filed on April 23, 1979; that plaintiff has taken no action to prepare the case for trial and has failed to prosecute this action with diligence.

2. That the Court ordered that a pretrial memorandum or an agreed-to pretrial order should be filed on or before March 26, 1980; that no pretrial memorandum or agreed-to pretrial order has been filed in this case.

3. That on June 5, 1980, the date set for the pretrial conference, counsel for plaintiff advised the Court that he intended to dismiss the action; that therefore, the Court requested plaintiff to file his dismissal within five days from June 5, 1980 or in the event such dismissal was not filed, that this Court would dismiss the action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this action should be and it is hereby dismissed for want of prosecution.

JAMES O. ELLISON
United States District Judge

13

AK/ji
6/13/80

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CASABLANCA FAN COMPANY, INC., a corporation,

Plaintiff,

vs.

ROBERT C. FISHER, d/b/a FISHER'S,

Defendant,

and

ROYAL LAMP, INC., a corporation,

Additional Defendant,

and

COOK BROTHERS, INC., a corporation, d/b/a COOK BROTHERS GALLERIA, a corporation,

Additional Party Defendant.

FILED

JUN 13 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Case No. 79-C-643-BT

PARTIAL DISMISSAL

TO: COOK BROTHERS, INC., a corporation:

NOTICE is hereby given that Plaintiff elects to dismiss as to you only, without prejudice, the above-entitled action, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure and dismisses as to Cook Brothers, Inc., only without prejudice.

Pursuant to the aforesaid rule, said notice is filed before this particular Defendant has filed an Answer or Motion for Summary Judgment.

UNGERMAN, CONNER, LITTLE, UNGERMAN & GOODMAN

By _____
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I, ALLEN KLEIN, one of the attorneys for the Plaintiff herein, do certify that on the _____ day of June, 1980, I mailed a true and correct copy of the within and foregoing Partial Dismissal to Paul F. McTighe, Jr., Attorney for Robert C. Fisher and Royal Lamp, Inc., 424 Beacon Building, Tulsa, Oklahoma 74103; and to Ira L. Edwards, 1606 First National Bank Building, Tulsa, Oklahoma 74103, attorney for Cook Brothers, Inc., with sufficient postage fully prepaid thereon.

_____
ALLEN KLEIN

LAW OFFICES
UNGERMAN CONNER, LITTLE UNGERMAN & GOODMAN
1710 FOURTH NATIONAL BANK BUILDING
TULSA, OKLAHOMA 74119

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA.

OKC CORPORATION, Plaintiff,	)	
vs.	)	Case No. 80-C 231-B
BEST WAY MARKETING CO., INC., Defendant..	)	

JUDGMENT

THIS ACTION was considered by the Court on the 13 day of June, 1980, on Application of the Plaintiff for the Entry of Default Judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure; it appearing to the Court that the Complaint in this action was filed on April 28, 1980, that Summons and Complaint in this action were duly served on the Defendant as required by law, it further appearing to the Court that Defendant has wholly failed to enter its appearance in the action or otherwise plead, and has defaulted, and it further appearing that default was entered against the Defendant, by the Court Clerk, and that no proceedings have been taken by Defendant since entry of his default.

The Court, having reviewed the pleadings, Exhibits and Affidavits on file finds:

1. That the Defendant is in default.

2. That Plaintiff is entitled to default judgment in its favor, for the relief prayed for.

3. That Plaintiff is the prevailing party and thereby entitled to an Attorney Fee award pursuant to Title 12, Oklahoma Statutes, Section 936.

4. That the Court finds, based upon Affidavits on file in the action, a reasonable Attorney Fee for Plaintiff is $ 250.00.

IT IS ORDERED AND ADJUDGED BY THE COURT, that Plaintiff, OKC Corporation, recover of Defendant, Best Way Marketing Co., Inc., Judgment in the sum of $12,735.78 with six percent (6%) per annum

on said sum from April 23, 1979, until Judgment, and with interest on the Judgment at the rate of twelve percent (12%) per annum from Judgment until said Judgment is satisfied, in accordance with Title 12, Oklahoma Statutes, Section 727(1) and all costs expended in the action.

IT IS FURTHER ORDERED AND ADJUDGED BY THE COURT, that Plaintiff, OKC Corporation, recover of Defendant, Best Way Marketing Co., Inc., Judgment for reasonable Attorney Fees in accordance with Title 12, Oklahoma Statutes, Section 936, determined by the Court to be the sum of $ 2550.00.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

G. BURT BAKKE, Plaintiff, vs. McCARTHY ENGINEERING & CONSTRUCTION, INC., an Oklahoma corporation, Defendant.	)	No. 79-C-182-BT

FILED
JUN 13 1980
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law entered this 13th day of June, 1980, judgment is hereby entered for the plaintiff, G. Burt Bakke, and against the defendant in the amount of $8,105.00 with interest at the rate of 6% from March 7, 1979 and at the rate of 12% from this date of judgment.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

27

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

G. BURT BAKKE, Plaintiff,	)	
vs.	)	No. 79-C-182-BT
McCARTHY ENGINEERING & CONSTRUCTION, INC., an Oklahoma corporation, Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried to the Court on May 28, 29, 30, 31, 1980 and closing arguments were made by counsel on June 2, 1980. The plaintiff concluded his evidence on May 30, 1980 and following the overruling of a motion for directed verdict the defendant went forward with its evidence and both sides rested on May 31, 1980. After considering all of the evidence, the relevant legal authority, and arguments of counsel, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is an action for money damages for alleged breach of contract (two written agreements of July 29, 1977 and September 6, 1977) brought by G. Burt Bakke ("Bakke") against McCarthy Engineering & Construction, Inc., ("McCarthy").

2. Bakke is a resident of the State of Missouri and McCarthy is a corporation organized under the laws of the State of Oklahoma with its principal place of business therein.

3. Bakke on July 29, 1977 entered into a written agreement whereby he was to render services to the defendant McCarthy and this agreement states:

> "As per our conversation pertaining to you becoming involved with McCarthy Engineering & Construction Inc., on a retainer basis, the following conditions would prevail.
>
> "This agrreement would be a monthly retainer of $1,000/mo. but only in effect only while under contract from client where the services of Mr. G. B. Bakke was employed. The $1,000/month would give me four days of your service. Any additional time per month would be at $125.00/day. Expenses incurred would be reimbursed. On work developed by you a fee of 1% of the contract price would be paid as a bonus which would be in

"addition to the above conditions. This bonus would be paid monthly as a percent (1%) of the monthly billings.

If the above is agreeable, please sign one copy and return for our files. This agreement would be effective immediately."

Subsequently, on September 6, 1977, Donald McCarthy, President of defendant, executed another document which reads:

"For the Silgas project in addition to our agreement dated July 29, 1977 the following conditions would prevail: On bonus in contract with Silgas (McCarthy), Bakke will share in the bonus 25% if we are under the cost estimate, 10% bonus on the schedule bonus and on extra work under the Silgas agreement Bakke will share in (1/2) half of the 10% fee."

4. On September 28, 1977 McCarthy entered into an agreement with Silgas, Inc., ("Silgas"), of Indiana, whereby McCarthy was to construct a 500,000 barrel capacity underground cavern in Indiana for the storage of liquid propane gas at an estimated cost of $3,546,335.00 plus fee. The basic consideration payable to McCarthy for this project was a fee of $350,000.00. By the terms of the Silgas-McCarthy contract there were potentially bonus amounts to McCarthy under three headings: under estimated cost, early completion (prior to August 15, 1978), and additional work. The early completion bonus provision was not to be effective unless the project came within estimated cost. McCarthy assumed the risks related to the performance of the Silgas-McCarthy contract and D.F.McCarthy, President of McCarthy, signed a personal guarantee of the Silgas-McCarthy contract.

5. The project was begun in late 1977, and was completed on August 23, 1978 following final testing.

On March 7, 1979 Silgas paid McCarthy $100,000.00, which amount completed the payment of the $350,000.00 fee owed by Silgas to McCarthy. At this time Silgas received a signed release from McCarthy wherein McCarthy acknowledged that it had received all monies owed it on the project.

6. It is Bakke's contention McCarthy owes him money under the 1% provision of the July 29, 1977 agreement and the three areas of the September 6, 1977 agreement.

7. The one percent (1%) of contract price ("monthly billings") bonus referred to in the McCarthy-Bakke agreement of July 29, 1977 applies to the Silgas-McCarthy cavern construction contract.

8. The total contract price ("monthly billings") of the project could reasonably be determined to be $3,976,964.70. One percent thereof is $39,770.00. Bakke has previously been paid $31,565.00 of the total amount by McCarthy so there remains $8,105.00 payable under the July 29, 1977 agreement between Bakke and McCarthy.

9. The total job costs in accordance with the Silgas-McCarthy contract (Plaintiff's Exhibit 7 plus Appendix I and II to Plaintiff's Exhibit 6) exceeded the sum of $3,546,335.00 so no bonus was payable to McCarthy as reflected in paragraphs B and C, page 9 of the Contract, and in turn no bonus is due or payable to Bakke under the September 6, 1977 agreement for either under estimated cost or early completion. Bonuses paid supervisory personnel in August 1978 near completion of the job were not based upon an accurate accounting determination of costs as required by the Silgas-McCarthy contract.

10. The cavern size was essentially the 500,000 barrel capacity required by the Silgas-McCarthy contract so there was no additional work money due McCarthy in accordance with page 9 of the Silgas-McCarthy contract or due Bakke under the September 6, 1977 agreement between Bakke and McCarthy.

11. The negotiated settlement of March 7, 1979 between Silgas and McCarthy was an arm's length good faith settlement of the rights and claims of both parties.

McCarthy paid Silgas the fair market value price for the used major equipment and certain inventory of used minor equipment and supplies in June 1979.

CONCLUSIONS OF LAW

1. The jurisdiction of the Court is based upon diversity of citizenship of the parties and the appropriate amount in controversy in keeping with 28 U.S.C. §1332.

2. Any finding of fact above which could also be properly characterized a conclusion of law is incorporated herein.

3. The agreements of July 29, 1977 and September 6, 1977 between McCarthy and Bakke are binding on the parties and pertain to the cavern construction contract of Silgas and McCarthy dated September 28, 1977.

4. The preponderance of the evidence supports no bonuses or payments were due by Silgas to McCarthy under the September 28, 1977 Silgas-McCarthy cavern construction contract for under estimated cost, early completion or additional work. In turn no such bonuses or payments were due by McCarthy to Bakke under the Bakke-McCarthy agreement of September 6, 1977.

5. The preponderance of the evidence supports Bakke is entitled to the additional sum of $8,105.00 from McCarthy under the one percent (1%) of contract price ("monthly billings") under the Bakke-McCarthy agreement of July 29, 1977.

6. A judgment for the plaintiff and against the defendant in keeping with these findings of fact and conclusions of law is entered contemporaneous herewith.

7. The issue of the attorneys' claims for attorneys fees herein is set for the 19th day of June, 1980, at 8:30 o'clock A.M. The parties are to submit pertinent legal authorities in advance of the hearing date.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 13 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THERESA ELLER, as widow and beneficiary of Johnny Lee Eller, deceased,	)	
Plaintiff,	)	
vs.	)	NO. 78 C 11 E
TEXAS LIFE INSURANCE COMPANY, a Texas Corporation,	)	
Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

Now on this 13 day of June, 1980; the Court having considered the STIPULATION FOR ORDER OF DISMISSAL WITH PREJUDICE filed by the party litigants herein, and having found that all claims, controversies, and disputes between plaintiff and defendant have been fully compromised and settled, finds that an Order of Dismissal With Prejudice should be entered pursuant to Rule 41, Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this lawsuit, in all particulars, be dismissed with prejudice to the refiling of same, with costs of this action to be borne by each of the party litigants.

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BOH DEVELOPMENT COMPANY, A Joint Venture; LEWIS P. BROOKS, and BROOKS OIL & GAS, INC., an Oklahoma Corporation,	)	
Plaintiffs,	)	
vs.	)	No. 78-C-478-C
DYCO PETROLEUM CORPORATION, A Minnesota Corporation,	)	
Defendant.	)	

ORDER OF DISMISSAL

Upon Stipulation of the parties, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, this action is dismissed with prejudice with each party to bear its own costs.

Given under my hand this 11 day of June, 1980.

(Signed) H. Dale Cook

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

KENNETH E. BAYSINGER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 79-C-388-C
	)	
FOREMOST-McKESSON, INC., a foreign corporation, and CHARLES W. MURDOCK,	)	
	)	
	)	
	)	
Defendants.	)	

MOTION FOR DISMISSAL WITH PREJUDICE

COMES now the plaintiff, Kenneth E. Baysinger, and applies to the Court for an order dismissing the above styled cause of action with prejudice to its refiling for the reason that an amicable settlement of the issues has been reached by the parties.

Dated this 13 day of June, 1980.

James Frasier
Attorney for Kenneth E. Baysinger

O R D E R

NOW on this 13 day of June, 1980, there comes on for hearing on the plaintiff's motion for a dismissal with prejudice of the above styled cause of action and the Court, being fully advised in the premises, finds, orders, adjudges and decrees that such motion should be and is hereby sustained and the clerk is directed to spread this dismissal with prejudice upon the proper dockets of the Court.

/s/ James O. Ellison
United States District Judge

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
JUN 11 1980
NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk
U. S. DISTRICT COURT

DONALD E. LANCASTER, Plaintiff, v. FOREMOST-McKESSON, INC., a foreign corporation, and CHARLES W. MURDOCK, Defendants.	)	No. 79-C-387-C

MOTION FOR DISMISSAL WITH PREJUDICE

COMES now the plaintiff, Donald E. Lancaster, and applies to the Court for an order dismissing the above styled cause of action with prejudice to its refiling for the reason that an amicable settlement of the issues has been reached by the parties.

Dated this 13 day of June, 1980.

James E. Frasier
Attorney for Donald E. Lancaster

O R D E R

NOW on this 13 day of June, 1980, there comes on for hearing on the plaintiff's motion for a dismissal with prejudice of the above styled cause of action and the Court, being fully advised in the premises, finds, orders, adjudges and decrees that such motion should be and is hereby sustained and the clerk is directed to spread this dismissal with prejudice upon the proper dockets of the Court.

FILED

JUN 13 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

/S/ James O. Ellison
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. Undetermined quantities of articles of drug in any dosage form, strength, or in any size container, manufactured by Pharmadyne Laboratories, Inc., Elmwood Park, New Jersey (formerly located at Hackensack, New Jersey), labeled in part: Defendant.	)	Civil Action No. 80-C-58-B

ORDER OF CONSOLIDATION AND TRANSFER

Pursuant to the Stipulation of counsel herein, and for good cause shown, it is hereby ordered that this action be transferred to and consolidated for trial in the United States District Court for the District of New Jersey with the action entitled, "United States of America, Plaintiff v. Articles of drug consisting of the following: *** Pharmadyne Furosemide Tablets *** 40 Mg. *** CAUTION *** 1000 tablets *** Pharmadyne Laboratories, Inc., etc., Civil Action No. 79-951.

It is further Ordered that the Clerk of this Court transfer and transmit the records in this action to the Clerk of the United States District Court for the District of New Jersey.

It is so Ordered this 13th day of June, 1980.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
WILLIAM N. ATKINS, Defendant.	)	CIVIL ACTION NO. 80-C-56-C

DEFAULT JUDGMENT

This matter comes on for consideration this 11 day of June, 1980, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, William N. Atkins, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, William N. Atkins, was personally served with Summons and Complaint on January 29, 1980, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, William N. Atkins, for the principal sum of $729.56, plus the accrued interest of $154.59 as of October 15, 1979, less the sum of $75.00 which has been paid, plus interest at 7% from October 15, 1979, until the date of Judgment, plus interest at the legal rate on the principal sum of $729.56 from the date of Judgment until paid.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA
HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

scw/lw

IN THE UNITED STATES DISTRICT COURT WITHIN AND FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KENNETH W. CRESSWELL,)
)
Plaintiff,)
)
vs.) No. 80-C-183-C
)
ART SCHENK, Sheriff and)
DR. BEAM,)
)
Defendants.)

FILED

JUN 11 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

Now on this 10th day of June, 1980, the above captioned matter came on for pre-trial. Plaintiff appeared in person; the Defendant, Art Schenk , was present by his attorney, Stephen C. Wilkerson and the Defendant, Dr. Beam, was present by his attorneys, Stephen C. Wilkerson and Jeffery Chubb. That during the pre-trial of said matter, the court heard argument on the Defendants' Motion to Dismiss for lack of jurisdiction and venue. That the court after advising the Plaintiff that it would sustain the Motion to Dismiss as to Dr. Beam, inquired of the Plaintiff whether or not he would wish his entire action to be transferred to the appropriate Federal District Court in Kansas. That the Plaintiff stated to the Court that he wished that his entire action against both Art Schenk and Dr. Beam be transferred to the appropriate U. S. District Court in the State of Kansas. Therefore, the Court ordered the entire matter transferred to said Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that this matter be and the same hereby is transferred to the appropriate United States District Court for the State of Kansas.

(Signed) H. Dale Cook

HONORABLE JUDGE H. DALE COOK, JUDGE OF THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF OKLAHOMA

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Order has been mailed to the plaintiff, Kenneth W. Cresswell, #105447, Star Route B, Box 220, Hominy, Oklahoma 74035, with sufficient postage thereon on this 10th day of June, 1980.

Stephen C. Wilkerson

Stephen C. Wilkerson

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT, OKLAHOMA

ALLAN WEST	)	
	)	
PLAINTIFF	)	
	)	
vs.	)	NO. 79 C 382 E
	)	
DOUGLAS M. COSTLE et al	)	
	)	
DEFENDANTS	)	

ORDER AND JUDGMENT ASSESSING COSTS AND FEES

On the 4th day of June 1980 Plaintiff's Motion to Assess Costs and Attorney Fees was heard. Plaintiff was present by his attorney, Andrew T. Dalton, Jr. and Defendants were present by their attorney Pat Rankin. The Court, having examined the Plaintiff's Motion and Defendants'' Response and based upon the statements of Defendants' attorney in open court, finds that the Court has jurisdiction and authority to grant costs and attorney fees in this case and that the Defendants do not dispute the right of Plaintiff to recover same. The Court further finds that the sum of $53.~~23~~ 72 is undisputed.

The Plaintiff presented sworn testimony and rested. The Defendants presented no testimony. Based upon the facts of the case, the testimony and applicable law the Court finds that the Plaintiff is to be granted an attorney fee of $3,750.00 and that such fee is fair and reasonable.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff have and recover of the Defendants the sum of $53.~~23~~ 72 court costs and further the sum of $3,750.00 attorney fee for the use and benefit of Plaintiff's attorney, Andrew T. Dalton, Jr.

James O. Ellison
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN - 9 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JERRY M. BLEVINS,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	
BRUCE NESCHER d/b/a SLEEK CRAFT BOATS, and d/b/a BOATS BY NESCHER, and MURRAY MARINE, INC., a Texas Corporation,	)	
	)	
Defendants.	)	No. 78-C-504-E

STIPULATION FOR DISMISSAL WITH PREJUDICE

It is hereby stipulated, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, and subject only to the approval of the Court herein, that the above-styled and entitled action and all claims and causes of action of the Plaintiff herein be dismissed with prejudice , each party to bear his own costs accrued or accruing herein.

Dated this 5th day of June, 1980.

Coy Dean Morrow
Wallace & Owens, Inc.
P. O. Box 1168
Miami, Oklahoma 74354
(918) 542-5501

Attorney for the Plaintiff

John R. Richards
Grigg, Richards & Paul
200 Thurston National Building
Tulsa, Oklahoma 74103
(918) 584-2583

Attorney for the Defendant

FILED

JUN 10 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

This case came on before the Court upon the Stipulation of the parties for a voluntary dismissal of said cause with prejudice; and the Court being fully advised, it is:

26.

ORDERED, the above-styled and entitled action and each of the claims and causes of action of the Plaintiff, be and the same is hereby dismissed with prejudice to the filing of a future action; and it is further:

ORDERED, that each of the parties hereto bear his own costs accrued or accruing herein.

DATED, this 9TH day of June, 1980.

James O. Ellison
United States District Judge
United States District Court for
the Northern District of Oklahoma

FILED

JUN 9 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
ROY D. VAN BLARICOM,	)	CIVIL ACTION NO. 80-C-253-E
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 9TH day of June, 1980, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Roy D. Van Blaricom, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Roy D. Van Blaricom was personally served with Summons and Complaint on May 7, 1980, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Roy D. Van Blaricom, for the principal sum of $628.67, plus interest at the legal rate from the date of this Judgment until paid.

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

DURABILITY INTERIORS, INC., an Oklahoma corporation

Plaintiff,

vs.

SYNTEX INCORPORATED, an Illinois corporation, D. DWAYNE SELK, an individual and RONALD V. COPPOLINO, an individual

Defendants.

NO. 80-C-202-B

JUDGMENT AS TO DEFENDANT
RONALD V. COPPOLINO

THIS ACTION was considered by the Court on the 6th day of June, 1980, on Application fo the Plaintiff for the Entry of Default Judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure; it appearing to the Court that the Complaint in this action was filed on April 14, 1980, that Summons and Complaint were duly served on the Defendant, Ronald V. Coppolino, as required by law, it further appearing to the Court that said Defendant has wholly failed to enter his appearance in the action or otherwise plead, and has defaulted, and it further appearing that default was entered against the Defendant on the 31 day of May, 1980, by the Court Clerk, and that no proceedings have been taken by Defendant since entry of his default.

The Court, having reviewed the pleadings, Exhibits and Affidavits on file finds:

1. That the Defendant, RONALD V. COPPOLINO is in default.

2. That Plaintiff is entitled to default judgment in its favor, for the relief prayed for.

3. That Plaintiff is the prevailing party and thereby entitled to an attorney fee award pursuant to Title 12, Oklahoma Statutes, Section 936.

4. That the Court finds, based upon Affidavits on file in the action, a reasonable attorney fee for Plaintiff is $ 3,723.00 .

IT IS ORDERED AND ADJUDGED BY THE COURT, that Plaintiff, DURABILITY INTERIORS, INC., recover of Defendant, RONALD V. COPPOLINO, judgment in the sum of $24,828.20, with 10% per annum on said sum from September 1, 1979 until date of judgment, and with interest on the judgment at the rate of 12% per annum until said judgment is satisfied, in accordance with Title 12 Oklahoma Statutes, Section 727(1) and all costs expended in the action.

IT IS FURTHER ORDERED AND ADJUDGED BY THE COURT, that Plaintiff DURABILITY INTERIORS, INC., recover of Defendant, RONALD V. COPPOLINO judgment for reasonable attorney fees in accordance with Title 12, Oklahoma Statutes, Section 936, determined by the Court to be the sum of $ 3,723.00 .

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 78-C-286-BT
BETTY JO HUDSON, et al., Defendants.	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

At pre-trial conference the parties agreed to submit this matter based on the stipulations contained in the Pre-Trial Order.

This litigation was commenced by the United States of America in behalf of four half-blood Osage Indian unallotted sons of James Fronkier to quiet title and recover possession of a two-thirds surface interest in 160 acres of Osage County, Oklahoma land. Said real property was the original homestead allotment of their father, James Fronkier, deceased full-blood Osage Allottee. The plaintiff also seeks to recover trespass damages since 1937. The defendants, by counter-claim, seek to quiet their title and possessory right to said 160 acre homestead allotment and an additional 80 acres surplus allotment which their predecessors acquired in 1937.

Federal Land Bank of Wichita, Kansas was a defendant, but plaintiff has dismissed as against the defendant bank.

FINDINGS OF FACT

The parties, in the Pre-Trial Order have stipulated to the facts, and the Court adopts said stipulation and based thereon makes the following Findings of Fact:

1. On October 12, 1908, James Fronkier, a full-blood enrolled member of the Osage Indian Tribe, Osage Allottee No. 1259, received a 160 acre homestead pursuant to the Act of June 28, 1906, 34 Stat. 539 conveying to him the surface of the following described land which is the subject of Plaintiff's lawsuit: SE/4 NE/4, NE/4 SE/4, Sec. 31; N/2 SW/4, Sec. 32,

T. 29 N., R. 8E., Osage County, Oklahoma. This deed was approved by the Assistant Secretary of Interior on February 8, 1909.

On June 5, 1909, James Fronkier also received a surplus allotment deed pursuant to Act of June 28, 1906, conveying to him, among other property, the W/2 NW/4, Sec. 32, T. 29 N., R. 8 E., Osage County, Oklahoma (80 acres), which deed was approved by the Assistant Secretary of Interior on July 30, 1909.

2. William David Fronkier, Benjamin Henry Fronkier (a/k/a Henry B. Fronkier), Francis Augustus Fronkier (a/k/a Frantz A. Fronkier), and Arthur Theodore Fronkier, now deceased, (Marion Elizabeth Fronkier, Executrix), in whose behalf the United States of America brings this action, are the natural born sons of James Fronkier and his non-Indian wife, Julia H. Fronkier.

3. On March 4, 1910, James Fronkier received a certificate of competency pursuant to the Act of June 28, 1906, §2(7), 34 Stat. 539, which was still in effect at the time of his death.

4. James Fronkier died on June 7, 1923, and his estate was distributed on December 10, 1924, by valid decree of distribution of the Probate Court of Kay County, Oklahoma. Distribution being pursuant to his Last Will, duly approved by the Secretary of Interior. The residue of his estate was set over and distributed by the probate decree as follows:

Julia H. Fronkier, wife	2/6ths
William D. Fronkier, son	1/6th
Francis A. Fronkier, son	1/6th
Benjamin H. Fronkier, son	1/6th
Arthur T. Fronkier, son	1/6th

The residuary estate consisted of his Osage Headright, cash, and Osage County real estate allotted to him as a member of the Osage Tribe of Indians, described as follows, to-wit:

SE/4 NE/4, NE/4 SE/4, Sec. 31; N/2 SW/4, Sec. 32, T. 29 N., R. 8 E., 160 acres original homestead.

W/2 NW/4, Sec. 32, T. 29 N., R. 8 E., 80 acres

Lots 3, 4 and 5, and the SE/4 NW/4, Sec. 6, and the SW/4 NE/4 NW/4, and the W/2 SE/4 NW/4 of Sec. 7, T. 21 N., R. 10 E.

5. The four Fronkier sons are all unallotted one-half blood Osage Indians, born subsequent to July 1, 1907, and none of them have received certificates of competency. Their ages at the time of their father's death on June 7, 1923, were: William David, 15; Francis Augustus, 12; Benjamin Henry, 9; and Arthur Theodore, 3.

6. Julia H. Fronkier, William D. Fronkier, and Francis A. Fronkier executed and delivered Warranty Deed with four dollars revenue stamps attached on April 3, 1937, conveying to Muriel M. Layton and Howard H. Layton, the 240 acres described therein, being the 160 acre homestead and 80 acres of surplus land, originally allotted to James Fronkier. This deed was not approved by the Secretary of Interior. Arthur T. and Benjamin H. Fronkier never, by written instrument, conveyed their undivided one-sixth interest in the 160 acres sought to be recovered by plaintiff, nor the additional 80 acres to Muriel M. and Howard H. Layton.

7. Muriel M. Layton, by Warranty Deed dated February 10, 1954, conveyed to Howard H. Layton the 240 acres, being the original 160 acre homestead allotment and 80 acres of the surplus allotment of James Fronkier. Said Warranty Deed also conveyed an additional adjacent 480 acres in Sections 30 and 31, Township 29 North, Range 8 East, and was recorded February 23, 1954, in Book 117, Page 586.

On February 24, 1955, Muriel M. Layton conveyed by Warranty Deed to Howard M. Layton, the W/2 of the NW/4, and the N/2 of the SW/4 of Section 32-29-8 (theretofore conveyed), along with an additional 560 acres of adjacent land in Sections 14, 30, 31 and 32, Township 29 North, Range 8 East, which deed was recorded March 4, 1955, in Book 119, Page 318.

Howard M. Layton died testate on June 14, 1968, and devised the subject 240 acres, along with an additional 2,660 acres of contiguous land in Sections 19, 20, 29, 30, 31, 32 and 33, Township 29 North, Range 8 East, to his daughter, Betty Jo Hudson, (Defendant and Counterclaimant herein), for her life, and upon her

death to her children, Mary Jo Hudson and Lisa Hudson (Defendants and Counterclaimants herein). Howard H. Layton also devised an adjacent 2,430 acres in Sections 13,14, 21, 22, 23, 27, 28, 33 and 34, in Township 29 North, Range 8 East, to his other daughter, Mary Lou Richardson, during her life and upon her death to her children, Michael Dean Richardson and Jody Lynn Richardson.

By decree of distribution of the District Court of Osage County on October 3, 1969, the 240 acres here in litigation, along with the contiguous approximately 5,190 acres, were distributed in accordance with the Will, with direction to the Executrix, Mary Lou Richardson, to mortgage any or all of the real estate to pay estate taxes, debts, expenses and costs of administration. Said decree of distribution also limited alienability of the remainderman interest in accordance with the Will as follows, to-wit:

> "(e). It is further ordered, adjudged and decreed that the remaindermen, the grandchildren of Howard Layton at the time of his death, to-wit: Michael Dean Richardson and Jody Lynn Richardson, the children of Mary Lou Richardson and Mary Jo Hudson and Lisa Hudson, the children of Betty Jo Hudson shall have no right to sell and dispose of their interest in the above described real estate, unless the same be sold to one or more of the grandchildren of Howard Layton named herein, Michael Dean Richardson, Jody Lynn Richardson, Mary Jo Hudson, or Lisa Hudson."

8. On February 19, 1970, the Executrix, Mary Lou Richardson, in said capacity and in her individual capacity, and defendant, Betty Jo Hudson, now Mills, executed a mortgage approved by the probate court, covering 4,582 acres of the land in the Howard H. Layton estate to the Federal Land Bank of Wichita, Kansas, securing a loan in the original principal sum of $215,000.00. This mortgage included the 240 acres in this litigation and the Federal Land Bank of Wichita, Kansas, was joined as a party defendant in this cause, as to the 160 acres which had been the original homestead allotment of James Fronkier. On January 16, 1979, the Federal Land Bank filed a Disclaimer in this cause, to which was attached a partial release of its mortgage only insofar as it covered said 160 acres and the following day, upon request of Plaintiff, this cause was dismissed as against the Federal Land Bank.

9. The defendants since 1969, and their predecessors in interest since April 3, 1937, have claimed full ownership and been in actual, open, exclusive, continuous and adverse possession of all of the surface rights of the 160 acres here claimed by plaintiff, as well as the 80 acres described in the counterclaim, under color of title and claim of ownership adverse to and to the exclusion of the four Fronkier sons and any and all others.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. This Court has jurisdiction by virtue of the fact the United States of America is plaintiff in this cause and pursuant to Title 28, U.S.C. §1345.

2. Under the Act of June 28, 1906, 34 Stat. 359, the following pertinent provisions were made:

(a) The Act directed the preparation of the final roll of the Osage Tribe and provided lands and funds belonging to the Indians be divided equally among the enrolled members.

(b) All children born after July 1, 1907, were excluded from enrollment.

(c) The homestead was declared to be inalienable and nontaxable for a period of 25 years, or during the life of the homestead allottee.

See United States v. Johnson, 29 F. Supp. 300 (USDC ND Okl. 1939).

3. Section 8 of the Act of April 18, 1912, 37 Stat. 86, provides:

> "[A]ny adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will, in accordance with the laws of the State of Oklahoma: Provided, that no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

4. James Fronkier received a certificate of competency in 1910 which effectively removed restrictions on conveyance of his surplus allotted land.

During his lifetime James Fronkier executed a will which was required to have the approval of the Secretary of the Interior before the devise could become operative to vest title in the homestead in his minor sons and wife. The Supreme Court held in LaMotte v. United States, 254 U.S. 570, 41 S.Ct. 204, 65 L.Ed. 411 (1921) that a devisee "[t]akes under the will as an instrument of conveyance, and not by descent as an heir." The Court found this form of alienation was within the restriction imposed by the Act of 1906. The Act of 1912 relaxed the restriction by declaring in Section 8 [above quoted] that an Indian could dispose of all or any part of his estate by will, in accordance with state law, if the will was approved by the Secretary. At the time of the execution of the will by James Fronkier and until his death, the 160 acre homestead allotment was restricted in his hands. The restrictions were removed by his death in 1923. LaMotte v. United States, supra. As to the 80 acre allotment designated "surplus", the restrictions were not in effect at the time of James Fronkier's death because of his certificate of competency and provision of his will dealing with the surplus allotment did not require the Secretary's approval. Cox v. Smith, 46 P2d 439 (Okl. 1935).

6. Under the Acts of Congress of June 28, 1906 and April 18, 1912, Osage Indians were not restricted as to alienation of lands acquired by devise.

7. The restrictions or provisions of the two Acts (1906 and 1912) reached the following lands:

(a) lands of living allottees; and

(b) lands allotted in the right of deceased members as to their heirs (allottees of 1906 who died shortly thereafter and whose heirs took in their stead).

See Kenny v. Miles, 250 U.S. 58, 39 S.Ct. 417, 63 L.Ed. 841 (1919); LaMotte v. United States, supra.

8. Section 3 of the Act of February 27, 1925, 43 Stat. 1008, provides:

> "Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior,....shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior."

In interpreting this section in United States v. Johnson, 29 F.Supp. 300, 302-303 (USDC ND Okl. 1939) the Court held the Act applied to two classes of Indians, i.e., first to lands devised to members of the Osage Tribe of one-half (1/2) or more Indian blood; and, second, to lands devised to members of the Osage Tribe who do not have Certificates of Competency. The Court went on to say "[t]he language is clear and shows that it applies to two classes of Indians, and it cannot be construed to apply to Indians of one-half (1/2) or more Indian blood who do not have Certificates of Competency.

9. Neither party contends the Act of February 27, 1925, reimposed restrictions on the Fronkier sons as to alienation of the 160 acres comprising the original homestead allotment. Both parties agree the February 27, 1925 Act applied to "members the Osage Tribe" as defined in the 1906 Act which confined the membership to the enrolled members of the Tribe and specifically excluded unallotted members born subsequent to July 1, 1907.

10. The Act of March 2, 1929, 45 Stat. 1481 provides:

> "Section 5: The restrictions concerning lands and funds of allotted Osage Indians, as provided in this Act and all prior Acts now in force, shall apply to unallotted Osage Indians born since July 1, 1907, or after the passage of this Act, and to their heirs of Osage blood...."

The Act of 1929 placed restrictions on unenrolled children born since July 1, 1907, even though the ancestor from whom a particular estate came was unrestricted as to the land. United States v. Johnson, supra, at 302.

11. The Fronkier sons did not have certificates of competency.

12. The March 2, 1929 Act did reimpose restrictions on the subject 160 acre tract and the attempted 1937 conveyance not approved by the Secretary of Interior is of no effect.

13. The conveyance of William D. Fronkier and Francis A. Fronkier, dated April 3, 1937, conveying to Muriel M. Layton and Howard H. Layton, among other property, the 160 acre homestead allotment, was not approved by the Secretary of the Interior, and is invalid as to the 1/6th interest of William D. Fronkier and the 1/6th interest of Francis A. Fronkier sought to be conveyed.[1/]

14. Defendants claim title to the 160 acre tract by virtue of adverse possession as to the interest of each of the Fronkier sons [William D. Fronkier, 1/6th; Francis Fronkier, 1/6th; Benjamin H. Fronkier, 1/6th; and Arthur T. Fronkier, 1/6th]. Oklahoma has the following limitation period for actions relating to real property (adverse possession]:

> "(4) An action for the recovery of real property not hereinbefore provided for, within fifteen (15) years."

60 Okla. Stat. §333 provides:

> "Occupancy for the period prescribed by civil procedure or any law of this State as sufficient to bar an action for the recovery of the property, confers a title thereto, denominated a title by prescription, which is sufficient against all."

In order to establish title to land by adverse possession in Oklahoma the possession "must be open, visible, continuous and exclusive, with claim of ownership such as will notify parties seeking information upon the subject that premises are not held in subordination to any title or claim of others, but against all title and claimants." Sears v. Oklahoma, 549 P2d 1211, 1213 (Okl. 1976); Christ Church Pentecostal v. Richterbert, 334 F2d 869, 874 (10th Cir. 1964), cert. denied, 379 U.S. 1000, 85 S.Ct. 719, 13 L.Ed.2d 702 (1965); Douglas-Gardian Wrhse. Corp. v. Jordan, 452 F.Supp. 558, 563 (USDC ED Okl. 1978).

15. The defendants' claim of adverse possession to the 160 acre homestead allotment is ineffectual under the circumstances present in this litigation because the state adverse possession statute is not applicable against wards of the United States. United States v. Minnesota, 270 U.S. 181, 46 S.Ct. 298, 70 L.Ed. 539 (1926); Chemah v. Fadder, 259 F.Supp. 910 (USDC WD Okl. 1966).

1/ The Court's personal philosophy is contrary to the law dictating the above result as to the 160 acre homestead tract -- but it is the function of Congress to make the law; not the Court.

16. Plaintiff is entitled to have judgment entered in its favor quieting title in the 160 acre homestead allotment as follows:

William D. Fronkier	1/6
Francis A. Fronkier	1/6
Benjamin H. Fronkier	1/6
Arthur T. Fronkier	1/6

17. Defendants are entitled to have judgment entered in their favor quieting title to the 80 acre surplus allotment of James D. Fronkier by virtue of the application of the Oklahoma adverse possession statutes, there being no dispute between the parties concerning the 80 acre surplus allotment.

18. It is the rule of construction language of statutes relating to Indians is to be construed favorably to them. Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941; Taylor v. Tayrien (CCA) 51 F2d 884; United States v. Howard, 8 F.Supp. 617 (USDC ND Okl. 1934).

19. The issue of rental and damage, if any, is set for hearing on the 19th day of June, 1980, at 1:00 P.M.

ENTERED this 6th day of June, 1980.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

JOSEPH C. SCHUBERT,

Plaintiff,

vs.

THE UNIVERSITY OF TULSA, et al,

Defendants.

No. 79 C-564-E

DISMISSAL WITH PREJUDICE

Comes now the plaintiff, Joseph C. Schubert, by Bill Smalley, his attorney of record in this cause, and HEREBY DISMISSES this action with prejudice.

Done at Tulsa, Oklahoma, this 6th day of June, 1980.

Joseph C. Schubert, plaintiff

By: Bill Smalley

Bill Smalley
Attorney for plaintiff
Suite 620
Fifty Penn Place
Oklahoma City, OK 73118
(405) 840-1228
840-3697

O R D E R

The foregoing Dismissal by plaintiff is hereby allowed, this 6th day of June, 1980.

S/ JAMES O. ELLISON
United States District Judge

Certificate

I hereby certify that on this 6th day of June, 1980, I delivered a copy of the foregoing to T. Eskridge, attorney for the defense, at his office in Tulsa, Oklahoma, by personal service.

Bill Smalley

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

INTERNATIONAL JOHNS-MANVILLE CORPORATION, a Delaware Corporation,	)	
Plaintiff,	)	
vs.	)	No. 78-C-603-E
S. L. INDUSTRIES, INC., a Connecticut Corporation,	)	
Defendant.	)	

JUDGMENT BY DEFAULT AGAINST S. L. INDUSTRIES, INC., A CONNECTICUT CORPORATION

In this action, the Defendant, S. L. Industries, Inc., a Connecticut Corporation, having been regularly served with a summons and complaint, and having failed to plead, answer or otherwise defend, the legal time for pleading or otherwise defending having expired and the default of said Defendant, S. L. Industries, Inc., a Connecticut Corporation, and the premises having been duly entered according to law; upon the Application of said Plaintiff, judgment is hereby entered against said Defendant pursuant to the prayer of said complaint.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff, International Johns-Manville Corporation, a Delaware Corporation, have and recover from the Defendant, S. L. Industries, Inc., a Connecticut Corporation, the sum of $200,000.00, with interest thereon at the rate of ten percent (10%) from the date hereof, until paid, together with the Plaintiff's costs and disbursements included in this action, amounting to the sum of $1,500.00, and that the Plaintiff have execution therefor.

JUDGMENT RENDERED THIS 5th day of June, 1980.

S/ JAMES O. ELLISON

JAMES O. ELLISON
JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CERTIFICATE OF MAILING

I, James C. Lang, do hereby certify that on the 4th day of June, 1980, I served the Clerk of the United States District Court for the Northern District of Oklahoma with a copy of the foregoing document.

James C. Lang

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MELECIO CRUZ, Plaintiff,	)	
vs.	)	No. 79-C-159-C
HORACE MANN INSURANCE CO. and STATE FARM CASUALTY INSURANCE CO., Defendants.	)	

J U D G M E N T

The Court on June 5, 1980, filed its Findings of Fact and Conclusions of Law which are hereby incorporated herein and made a part of its Judgment.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Judgment be entered in favor of the defendant State Farm Casualty Insurance Company as against the plaintiff Melicio Cruz, and in favor of the plaintiff Melecio Cruz as against the defendant Horace Mann Insurance Company in accordance with the Court's Findings of Fact and Conclusions of Law.

It is so Ordered this 5th day of June, 1980.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MELECIO CRUZ, Plaintiff,	)	
vs.	)	No. 79-C-159-C
HORACE MANN INSURANCE CO. and STATE FARM CASUALTY INSURANCE CO., Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action for a declaratory judgment pursuant to Title 28 U.S.C. §2201. The plaintiff is a school teacher and the defendants have issued insurance policies to the plaintiff. The plaintiff asks the Court to determine that he is entitled to indemnity and a defense from either or both of the defendants under their respective insurance policies in regard to a state court action where the plaintiff has been sued for personal injuries suffered by a student. The defendant State Farm admits that its policy was in force and effect at the time of the incident in question, but alleges that there was no coverage because the plaintiff was at that time engaged in a "business pursuit". The defendant Horace Mann also admits that its policy was in force and effect but contends that there was no coverage because the plaintiff was not performing a "required" activity of his position at the time of the incident in question.

After considering the pleadings, the testimony and exhibits admitted at trial, all of the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following findings of fact and conclusions of law.

Findings of Fact

1. The plaintiff herein, Melecio Cruz, is a citizen of the State of Oklahoma, residing in Tulsa, Oklahoma.

2. The defendant Horace Mann Insurance Company is an Illinois corporation having its principal place of business in Springfield, Illinois.

3. The defendant State Farm Casualty Insurance Company is an Illinois corporation having its principal place of business in Bloomington, Illinois.

4. There is more than $10,000.00 exclusive of interest and costs in controversy herein.

5. On November 16, 1977, the plaintiff was a history and Spanish teacher at Central High School in Tulsa, Oklahoma.

6. The head wrestling coach at Central at that time was Mr. Bill Hewlett.

7. Mr. Hewlett and the plaintiff had discovered a common interest in high school wrestling, plaintiff having been assigned as an assistant wrestling coach at McClain High School prior to his move to Central.

8. Plaintiff and Mr. Hewlett had several discussions about the Central wrestling program which culminated in Mr. Hewlett's suggestion to the plaintiff that he assist in the wrestling program.

9. The plaintiff was never officially assigned as an assistant wrestling coach at Central, but he did provide regular assistance to the wrestling coaches there starting with the beginning of the 1977 wrestling season in October of that year. Plaintiff's assistance was helpful and appreciated.

10. The Tulsa Public Schools recognize and school administrations encourage teachers' volunteering to help in school activities other than those to which they may be officially assigned. There is no official directive prohibiting such volunteering.

11. On November 16, 1977, after his last scheduled class period, the plaintiff reported to the wrestling room at Central, where Central and McClain High School were having a joint workout.

12. Plaintiff there became involved in a brief wrestling match with one Everett Hunt, Jr., a Central student.

13. Mr. Hunt received personal injuries as a result of that encounter for which he and his parents wish to recover in Case Number CT-78-361 in the District Court of Tulsa County.

14. Plaintiff's policy with State Farm is a "Homeowners Policy" which provides in pertinent part as follows:

COVERAGE E -- PERSONAL LIABILITY:
This Company agrees to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage, to which this insurance applies, caused by an occurence. This Company shall have the right and duty, at its own expense, to defend any suit against the Insured seeking damages on account of such bodily injury or property damage. . . .

COVERAGE F -- MEDICAL PAYMENTS TO OTHERS:
This Company agrees to pay all reasonable medical expenses, incurred within one year from the date of the accident, to or for each person who sustains bodily injury to which this insurance applies caused by an accident. . .
(2) . . . if such bodily injury
. . . .
(b) is caused by the activities of any Insured, or by a residence employee in the course of his employment by any Insured. . . . .

THIS POLICY DOES NOT APPLY:
1. Under Coverage E -- Personal Liability and Coverage F -- Medical Payments to Others:
. . .
(d) To bodily injury or property damage arising out of business pursuits of any insured except activities therein which are ordinarily incident to non-business pursuits. . . .

Plaintiff's Exhibit 2, pp.6,7.

15. Plaintiff's policy with Horace Mann is a group policy entitled "NEA Educators Employment Liability Policy". That policy provides in pertinent part as follows:

III. COVERAGES
. . .
A. EDUCATORS LIABILITY. The Company agrees to pay all damages which the insured shall become legally obligated to pay as a result of any claim arising out of an occurrence or event in the course of the insured's educational employment activities, and caused by any acts or omissions of the insured or any other person for whose acts the insured is legally liable, not to exceed the limit of liability stated in the Declarations for this coverage.

With respect to insurance afforded by this coverage, the Company shall:

(1) defend any civil suit against the insured seeking damages, other than punitive damages, which are payable under the terms of this policy . . . [T]he Company may elect to reimburse but not defend the insured for the reasonable costs actually incurred in any such defense, and will notify the insured of its decision. . . .

II. DEFINITIONS

. . .

B. EDUCATIONAL EMPLOYMENT ACTIVITIES. The term "Educational Employment Activities" means the activities of the insured performed as required by his/her eligible occupational position in the course of his/her employment by an educational unit. Any activity or endeavor involving compensation or other advantage not provided as a required condition of his/her employment in an eligible occupational position by an educational unit shall be excluded from coverage.

. . .

D. ELIGIBLE OCCUPATIONAL POSITION. The term "Eligible Occupational Position" means only those positions listed and defined herein:

1. Educator An "Educator" is a natural person who is certified to teach under the relevant state statutes and who is employed by an educational unit to provide instruction or training to students of the educational unit in those areas which they are deemed qualified to teach. . . .

Plaintiff's Exhibit 1, pp.1-3.

Conclusions of Law

1. This Court has jurisdiction under Title 28 U.S.C. §1332(a)(1).

2. Venue is properly laid with this Court under Title 28 U.S.C. §1391(a).

3. In construing an insurance contract, its terms and words, if unambiguous, must be accepted in their plain, ordinary, and popular sense. Parties to insurance contracts are free to contract for insurance to cover such risks as they see fit and are bound by the terms of the contract and courts will not undertake to rewrite terms thereof. The contruction of an insurance policy should be a natural and reasonable one, fairly construed to effectuate its purpose, and viewed in the light of common sense so as not to bring about an absurd result. Insurance contracts are to be construed in favor of the object to be accomplished. A policy of insurance is a contract and should be construed as

every other contract, that is, where not ambiguous, according to its terms. An insurance company may limit the risk for which it is responsible. Wiley v. Traveler's Insurance Co., 534 P.2d 1293, 1295-6 (Okla. 1974).

4. The term "arising out of" concerns the origin and cause of accidental injury. Liebmann Arctic Ice Co. v. Henderson, 486 P.2d 739, 742 (Okla. 1971). As the term is used in the Workmen's Compensation Act, 85 O.S. §1 et seq., it requires a causal connection between employment and injury. An act leading to injury must be part of the duty an employee was hired to perform, or reasonably incident thereto. Injury does not arise out of employment unless a result of the nature, conditions, obligations, or incidents of employment. Loggins v. Wetumka Gen'l Hospital, 587 P.2d 455, 459 (Okla. 1978); Internat'l Spa v. Jones, 525 P.2d 630, 632 (Okla. 1974); Belscot Family Center v. Sapcut, 509 P.2d 905, 908 (Okla. 1973).

5. Interpretation of language found in workmen's compensation statutes has like application to the same terms found in liability insurance contracts. United States Fidelity & Guaranty Co. v. Reinhart & Donovan Co., 171 F.2d 681, 684 (10th Cir. 1948).

6. Plaintiff's "business", or rather the activity that occupied his time for the purpose of a livelihood or profit, Wiley v. Traveler's Insurance Co., supra, was that of school-teacher. "Incident" refers to "that which appertains to something else which is primary." Security Nat'l Insurance Co. v. Sequoyah Marina, 246 F.2d 830, 833 (10th Cir. 1957). Though not officially a part of his "business", plaintiff's assistance in the wrestling program was certainly an "incident" thereof. The injury to Mr. Hunt therefore arose out of a business pursuit of the plaintiff and the State Farm policy provides no coverage to the plaintiff for that incident.

7. In the Horace Mann policy, paragraph II(B), the phrase, "Educational Employment Activities" means the activities of the insured performed as required by his/her eligible occupational position. . . .", is ambiguous. It is not clear whether "as required" modifies "activities" or "performed". Construing the phrase against Horace Mann and giving it its most natural meaning, the phrase should read "performed as required", in the sense of "performed in accordance with the requirements of . . ."

8. At the time of the incident in question, the plaintiff was not performing contrary to the requirements of his "eligible occupational position" as an "educator". Consequently, the Horace Mann policy affords the plaintiff coverage under "Educators Liability" for said incident.

It is so Ordered this 5th day of June, 1980.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

VALIANT CONSTRUCTION COMPANY, an Oklahoma corporation,

Plaintiff,

vs.

No. 77-C-60-C

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New York corporation,

Defendant,

vs.

DOROTHY J. PELT,

Third Party Defendant.

O R D E R

This action was initiated by plaintiff, Valiant Construction Company, an Oklahoma corporation, (Valiant) against defendant Equitable Life Assurance Society of the United States, (Equitable) alleging diversity and that the Equitable held a life insurance policy or contract in excess of $10,000. The plaintiff purchased a $150,000 life insurance policy of defendant covering the life of Marvin J. Pelt August 8, 1973, being policy #73383522. That on or about January 17, 1977, the insured Pelt was killed and that therefore Valiant was entitled to the proceeds of the policy.

Equitable answered, admitted it was a foreign corporation with sufficient contacts with the State of Oklahoma to warrant venue and jurisdiction of this Court. Equitable further admitted it held a life insurance policy insuring the life of Marvin Pelt which had been purchased by Valiant in the amount as plead and that the insured departed this life on or about January 17, 1977. However, Equitable plead that the plaintiff had transferred, assigned and delivered the subject insurance contract to one Dorothy J. Pelt, as

owner and beneficiary. Equitable further plead that when in fact it had received properly executed proof of claim it would file an action in interpleader and pay the proceeds in to the register of the Court.

Thereafter Equitable filed an application to join third party defendant and for instruction. The attorney for plaintiff did not object to the application. The Court entered an order authorizing the third party complaint, and upon filing of the interpleader Equitable filed its amended answer and Complaint in Interpleader. It was plead that the Court had jurisdiction pursuant to Title 28 U.S.C., §1377 and Rule 22 of the Federal Rules of Civil Procedure in that Equitable had in force Policy of Insurance No. 73383522 with Marvin J. Pelt a named insured with $150,000 life coverage and $150,000 accidental death coverage. It was admitted that the insured was killed by accidental means on or about January 17, 1977.

Equitable deposited $300,000 in the register of the Court, alleged that Valiant and third party defendant, Dorothy J. Pelt each claimed the proceeds of the policy and requested the Court to adjudicate opposing claims.

Third party Defendant Dorothy J. Pelt filed her answer. She answered the complaint of the plaintiff Valiant, and alleged the "true plaintiff herein is one James Martin, a stockholder of Valiant Construction Company. That the said James Martin is not a majority stockholder in the company, and that this action has been brought by James Martin without the consent or permission of the majority of the stockholders and/or directors of the Valiant Construction Company." Mrs. Pelt requested that the complaint be dismissed or being without authority or in the alternative that James Martin be substituted as the true plaintiff.

All parties submitted to the Court an approved Journal Entry of Judgment which held that Valiant and Mrs. Pelt each

claimed the insurance proceeds. Upon payment of the proceeds Equitable was dismissed from the case.

The pretrial order admitted:

1. That the Valiant Construction Company, an Oklahoma corporation was incorporated on the 3rd day of January, 1973.

2. Marvin Pelt, Dorothy Pelt, Jim Martin and Hope Martin were the original incorporators.

3. Marvin Pelt and Jim Martin at the time of incorporation were the sole stockholders each owning 50% of the stock.

4. Jim Martin, Hope Martin, Dorothy Pelt and Marvin Pelt were all directors of the corporation as formed, with Jim Martin as president, Marvin Pelt as Vice-President and Hope Martin as secretary-treasurer.

5. That Jim Martin and Marvin Pelt entered into the life insurance purchase agreement as attached to the defendant Pelt's answer in 1973, and that life insurance was purchased on the lives of both Pelt and Martin in accordance with this agreement.

6. That the premiums were paid upon the policies by Equitable drawing upon the account of Valiant Construction Co.

7. That as originally purchased the corporation was the owner and beneficiary of the life insurance policies.

8. That in 1973 Jim Martin and Marvin Pelt executed the stock valuation agreement as set forth in the answer of the defendant Pelt.

9. That in January, 1976, Jim Martin wanted to close out the corporation and assume losses or declare bankruptcy, but Pelt wanted to continue to operate the corporation, and in consequence thereof the stock purchase agreement as attached to Pelt's answer was signed and agreed to by the parties.

10. That subsequent to the signing of the stock purchase agreement, and in accordance with its terms the insurance policy on Jim Martin's life was reduced to $50,000.

11. That following the stock purchase agreement in January, 1976, Jim Martin became employed elsewhere, and was not actively involved in the corporation after January, 1976.

12. That after January 10, 1976, Hope Martin turned over the books of the corporation to Dorothy J. Pelt and was not actively involved with the corporation after that date.

13. That Marvin Pelt operated the company and Dorothy Pelt handled the bookkeeping after January, 1976 and until his death.

14. That Marvin J. Pelt had reduced the debts of the corporation by approximately $57,000.00 between January, 1976 and the time of his death.

15. That the policy in question was a term policy without cash value.

The pretrial order defined the facts in controversy as follows:

1. That on January 30, 1976, Marvin Pelt at a meeting of stockholders, elected himself president and Dorothy Pelt secretary-treasurer.

2. On June 12, 1976, at a meeting attended by Marvin Pelt and Dorothy Pelt, a resolution was adopted by the board of directors authorizing Marvin J. Pelt to assign the insurance policy in question.

3. On June 21, 1976, ownership of the policy was transferred to Dorothy J. Pelt, and Dorothy J. Pelt was made beneficiary of the policy.

4. That the premiums for the policy in question were paid by the corporation on behalf of Dorothy J. Pelt and were received by her in lieu of salary.

5. That Dorothy J. Pelt was the owner and beneficiary

of the policy in question.

In general the pre-trial order envisioned the legal question to be the validity of the corporate meetings held January 30, 1976, and thereafter and the legality of the acts transferring ownership and the beneficiary of the subject policy.

Approximately two weeks after filing the pre-trial order Dorothy J. Pelt filed her motion to intervene as administrator of the Estate of Marvin J. Pelt, Deceased, which was sustained by the Court. As Administrator she admitted all the allegations of plaintiff's complaint except paragraph 8 which alleged plaintiff was owner and beneficiary of the subject policy. She further alleged the execution of the life insurance agreement between Valiant, Martin and Pelt, tendered Pelt's stock in accordance with the terms thereof and requested the Court to enter judgment sustaining the agreement and awarding the proceeds of the policy in accord with its terms. February 1, 1978, the matter came on for non-jury trial and the parties presented their evidence and the case was submitted for determination.

September 19, 1978, the Court directed a letter to the parties which read:

> The plaintiff in this action has consistently taken the position that if the Court should determine that the Martins had resigned as directors of Valiant Construction Company, there could have been no effective change of the beneficiary of the life insurance policy involved in this case.
>
> At the trial of the case, the Court inquired of counsel for the plaintiff whether or not it would follow that if he were correct regarding the corporation's power to change the beneficiary, then the corporation likewise would not have had the power to institute this lawsuit. Such a question may be of more than academic interest. The interpleader portion of this action was instituted pursuant to Rule 22 of the Federal Rules of Civil Procedure, rather than 28 USC §1335. Therefore the jurisdiction of this Court over all phases of this action is dependent upon its jurisdiction over the action as originally filed, i.e., Valiant Construction Company v. Equitable Life Assurance Society of the United States.
>
> In order to aid the Court in rendering its findings of fact and conclusions of law in this case, the parties are directed to file, within twenty (20) days of this date briefs on the following issue: In

the event that the Court should determine that the Martins had resigned as directors of Valiant Construction Company prior to February 9, 1977, the date this action was filed, what effect, if any, would such a finding have on the existence of this courts' jurisdiction over this action?"

While the question of jurisdiction was under consideration by the Court the plaintiff filed its Motion for Leave to File Amended Complaint. This motion requested permission to amend the complaint for the purpose of substituting a J. D. Sewell, as Receiver for Valiant, as party plaintiff. The motion alleged that on September 28, 1978, Letha Pelt Warren, a creditor of Valiant had instituted an action in the District Court in and for Okmulgee County, Oklahoma, against Valiant to recover a debt and that on September 28, 1978, District Court appointed J. D. Sewell as Receiver and further authorized the receiver to employ David H. Sanders to represent the receiver in the case pending in the Northern District of Oklahoma, Cause No. 77-C-60. The petition presented to the state District Court, among other matters, alleged that Valiant stockholders James Martin and Hope Martin employed David Sanders to sue Equitable in the U. S. District Court for the Northern District of Oklahoma, in behalf of Valiant and such was instituted being Cause No. 77-C-60-C. It was also alleged that Valiant did not have three directors and that no directors or stockholder meetings had been held since the death of Pelt. See Exhibit 1 to Valiant's Motion for Leave to File Amended Complaint.

It should be noted that this document was the first that asserted that Valiant had not authorized suit but that James Martin and Hope Martin had caused this Federal suit in behalf of Valiant and the first indication Hope Martin was a stockholder in Valiant. All the corporate records and representations previously had been that Hope Martin held no stock interest in Valiant.

The initial plaintiff in the action filed in the District Court in and for Okmulgee County was Letha Pelt Warren and

that Suit was filed September 28, 1978. Thereafter a Second Motion for Leave to File Amended Complaint was filed by Valiant to substitute James Martin as Receiver for Valiant, as party plaintiff on October 8, 1978 with Exhibit #4 being an order by the Honorable John Maley, Judge of the District Court for Okmulgee County, Oklahoma, appointing Martin receiver and again authorizing the receiver, Martin, to hire David H. Sanders, an attorney, to prosecute the federal action in his behalf.

Attorney Sanders was the same attorney that instituted Valiant Construction Co. v. Equitable Life Assurance Society of the United States, Cause No. 77-C-60 in the U. S. District Court for the Northern District of Oklahoma (federal case) and represented both receivers appointed by the State District Court.

Attorney James S. Steph in the federal case at all times represented Dorothy J. Pelt individually as third party defendant and also represented Dorothy J. Pelt as administrator of the estate of Marvin J. Pelt. Attorney Steph as attorney for Dorothy Pelt on December 1, 1978, filed Response to Application for Substitution in which it was prayed that the receivers' application to amend the complaint be denied. Attached to Dorothy Pelt's motion was a motion filed in the state court signed by attorney Steph as attorney for Valiant.

Valiant in the state court action claimed that the receivership action had been previously dismissed and that the state court action was otherwise improper. A document attached to Third Party Defendant's brief in Response to Motion for Leave to File Amended Complaint was a filed stamped dismissal with prejudice filed by plaintiff Letha Pelt Warren in the state court action dated October 26, 1978. This Court later received a filed stamped Journal Entry dated January 8, 1979, and filed January 10, 1979,

dismissing the state action and discharging all of the receivers "heretofore appointed in the above cause by the Court..."

Meanwhile, this Court on December 26, 1978, filed its Findings of Fact and Partial Conclusions of Law wherein the Court found that James Martin and Hope Martin had resigned as directors of Valiant Corporation in January, 1976, and that with Marvin Pelt's death in January, 1977, Valiant had only one director: Dorothy Pelt. Oklahoma law provides that a corporation has the power to sue in its corporate name, but the power may be exercised only by a board of directors having at least three members. See Title 18 Okla.Stat.Annot. §§1.19, 1.34 and 1.35. The Court held that because it had only one director, Valiant was authorized to carry on only the ordinary and necessary operations for a reasonable time until new directors could be elected; and further that the filing of this lawsuit was not an ordinary and necessary operation. Thus, the decision to file this lawsuit was ultra vires and therefore void. See Findings of Fact and Partial Conclusions of Law, filed Dec. 26, 1978, p.7. Because of the apparent lack of capacity of the plaintiff Valiant and the consequent jurisdictional defect, and because the appointment of a receiver for Valiant that might have cured the defect was then pending in Oklahoma State court, this Court withheld ruling on dismissal pending the outcome of the receivership action in state court. That action was dismissed on January 10, 1979. However, as the Court noted at the time, the appointment of a receiver might not have cured the defect because the action of filing the lawsuit was probably void ab initio and not capable of being ratified. See Findings of Fact, supra p.7.

The parties, including James Martin as well as Valiant and Dorothy Pelt, thereafter filed other documents with this Court, as listed above. None of them has affected the

jurisdictional defect, and this action must now be dismissed.

The Court has before it various applications from the defendant Dorothy Pelt, from plaintiff Valiant by and through James Martin, and from the District Court of Okmulgee County, State of Oklahoma, seeking the transfer of the funds deposited in this Court by Equitable Life Assurance Society to the District Court of Okmulgee County. This Court is without authority to comply; the only proper action is the return of the funds to Equitable, upon its motion, pursuant to Title 28, U.S.C. §2042.

For the foregoing reasons, it is hereby ordered that this action be dismissed for lack of jurisdiction. It is further ordered that the proceeds of the insurance policy that are the subject of this action, deposited in this Court by Equitable Life Assurance Society of the United States and held by the Clerk of this Court, be retained pending receipt of Equitable's petition for the return of said funds, pursuant to Title 28 U.S.C. §2042, at which time the funds will be returned to Equitable.

It is so Ordered this 5th day of June, 1980.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN THE MATTER OF HOME-STAKE PRODUCTION COMPANY, Debtor, ROY VONFELDT, Plaintiff, vs. ROYCE H. SAVAGE, as Trustee of Home-Stake Production Company, Bankrupt, et al., Defendants.	)	In The Proceedings For The Reorganization of a Corporation Under the Provisions of Chapter X No. 73-B-922

MEMORANDUM OPINION

FACTS:

This is an appeal by the plaintiff-appellant from a judgment of the Bankruptcy Court in favor of all defendants-appellees on their respective motions for summary judgment.

Plaintiff-appellant, Roy Vonfeldt ("Vonfeldt"), seeks specific performance of a contract to purchase producing oil and gas leases in Russell County, Kansas ("Gorham property"), loss of profits from the date of the alleged contract July 20, 1973, and "...such other and further relief as is just." The prevailing party, defendants-appellees, are the Home-Stake Production Company Trustee ("Trustee"), the debtor, Home-Stake ("Home-Stake"), and two hundred and nine named defendants ("Participants").

Home-Stake operated the Gorham property under what it called its 1961 and 1963 programs. The Participants owned various undivided working interest units in the Gorham property as a result of letter agreements with Home-Stake. (Stipulations, Ex. P and O)

At the time of the alleged contract Home-Stake owned 15.50% working interest in the 1961 program (31 units) and 30.44% working interest in the 1963 program (148.54 units). Home-Stake has acquired an additional 35.00 units in the 1961 program and 58.05 units in the 1963 program since July 1973 by order of the Bankruptcy Court in the reorganization as a result of the Participants'

abandonment of certain of their interests. The 1961 program consisted of a total of 200 units and the 1963 program 488 units. The specific percentage of the working interest owned by the many Participants is not set out in the record but collectively they owned a majority of the working interest of each program.

On June 15, 1973 Home-Stake mailed a solicitation (Vonfeldt Deposition, Ex. 1) for bids to various parties to purchase the Gorham property. The solicitation stated Home-Stake owned 100% of the working interest in each lease comprising the Gorham property and further stated no "warranty of titles or covenants of titles as to the leasehold rights." In response to the solicitation Vonfeldt submitted by letter his bid to purchase the Gorham property for a total price of $261,000.00.

On July 20, 1973 Home-Stake sent a letter to Vonfeldt stating his bid had been received and was accepted with a proposed effective closing date of the sale of August 1, 1973. (Vonfeldt Deposition, Ex.2) Vonfeldt signed the letter and returned it to Home-Stake.

Shortly after July 20, 1973 Vonfeldt terminated his regular employment of 23 years in reliance upon Home-Stake's acceptance of his bid and since that time has been self-employed in the operation of other oil producing properties he owns.

Although under their agreements with Home-Stake the participants had assignments of their proportionate interests in the programs, as of July 20, 1973 the only assignments of the Participant-Defendants' interests filed of record were: 1961 program - Joseph Gorelik, and 1963 program - Solene B. Lemann, Edward B. Benjamin, Jr., Edward B. Benjamin, Sr., and W. Mente Benjamin. Home-Stake was reflected as the owner of record of the balance of the leasehold interests comprising the Gorham property as of July 20, 1973.

When Vonfeldt submitted his bid he relied entirely upon the representation of Home-Stake that it owned 100% of the Gorham property working interest. He made no title examination or search

of the public record until approximately three years later.

Home-Stake was without authority of any of the Participants in the 1961 or 1963 programs to sell the Participants' interest. Vonfeldt received a telephone call on July 24, 1973 from Home-Stake advising him the sale could not be completed by August 1, 1973. On August 8, 1973 Vonfeldt received a letter from Home-Stake stating:

> "Because of certain changes in management, we are unable to complete transfer of the subject property at this time.
>
> "We regret very much any inconvenience and expense caused by the delay and can only advise you that you will be the first to be contacted when the properties can be sold."

Shortly after receiving this letter Vonfeldt hired attorney Rex Cully of Russell, Kansas to represent him in the matter of the purchase.

There were some additional telephone conversations between attorney Cully and the Home-Stake representative and then a letter was sent by Home-Stake to attorney Cully dated September 11, 1973 which stated:

> "This is an interim report relating to the disposition of Home-Stake properties near Gorham, Kansas. In our last telephone conversation, I mentioned the possibility of obtaining assignments from each of the many participants who own interests in Gorham properties. Since our discussion, many other problems, some of which I may have mentioned to you, have prevented any further steps toward clearing the title. Some of these newer problems could have a direct bearing on the title.
>
> "I know of the importance to Mr. Vonfeldt and regret that I cannot report more progress. However, within the next week or so, certain actions may make the disposal of assets a more simple procedure. I will keep you informed and will contact you again near the end of the month."

After discussing the September 11, 1973 letter with Vonfeldt, attorney Cully on September 12, 1973, sent the following letter to Home-Stake:

> "Thank you for your letter of September 11 regarding progress toward disposition of the Gorham properties. I will relay the information you have given me to Mr. Vonfeldt.

"In view of the problems which have arisen, I am uncertain whether Mr. Vonfeldt wishes to pursue the purchase of the various properties. I will, however, discuss the matter with him at the first opportunity. Since he and I have been put on notice of the existence of substantial title problems relating to the Gorham properties, it is possible he would be interested in the purchase of these properties if Home-Stake would warrant the title. In any event I will talk with Mr. Vonfeldt as soon as possible.

"I will appreciate any later information you can give me about clearing your title problems."

Vonfeldt confirmed in his testimony he advised attorney Cully he was willing to go on with the transaction if the title problems could be straightened out.

On September 20, 1973 Home-Stake filed its voluntary petition for reorganization under Chapter X of the Bankruptcy Act.

On October 29, 1973 attorney Cully sent the following letter to Home-Stake:

"Following my letter to you dated September 12, 1973, I have talked with Mr. Roy Vonfeldt about the Gorham properties belonging to Home-Stake Production Company. Mr. Vonfeldt desires to complete the purchase of these properties in accordance with his bid, which was accepted by Home-Stake Production Company.

"My last letter indicated I was uncertain about his desires toward acquisition of the properties in view of your difficulties in consummating the sale and transfer of the properties. Mr. Vonfeldt's position is that he has made a valid offer for the properties which was accepted by you and desires information from you about when the sale can be completed.

In our last conversation, you stated that you anticipated some additional developments which make it possible to complete the transfer of these properties. I have not received further information. Would you please advise me of the status of this matter so I may relay the information to Mr. Vonfeldt."

Home-Stake then on October 31, 1973 replied by letter to attorney Cully as follows:

"On September 20, 1973, Home-Stake filed for reorganization under Chapter X, and the Court appointed Judge Royce H. Savage as Trustee. I had hoped to contact some of the participants to determine whether or not they would be interested in signing some sort of a release, but this was delayed by the uncertainty prevailing during the past few weeks.

"Home-Stake is also undergoing a change in management possibly on November 1, 1973. Consequently, I can only say that the possible sale of the properties seems most unlikely at this time. In the plan for reorganization, I will certainly advise the Court of Mr. Vonfeldt's offer, but the information that I have to date indicates that Home-Stake

"does not have the right to sell the participants' interests without their approval.

"If new developments arise within the next few weeks, I will contact you."

The next response by Vonfeldt was seven months later when his attorney Cully on June 6, 1974 sent the following letter to Home-Stake:

"Your attention is invited to your invitation to bid relating to the sale, among others, of your Gorham Waterflood Project in Russell County, Kansas, and to the bid submitted by Mr. Roy Vonfeldt for the properties included in that invitation to bid. Reference is made to your letter to July 20, 1973, in which Mr. Vonfeldt's bid in the total amount of $261,000.00 was accepted.

"Demand is hereby made upon you for the completion of the sale of these properties in accordance with your acceptance of Mr. Vonfeldt's bid. Mr. Vonfeldt is and has been prepared to complete the purchase of these properties in accordance with his bid and your acceptance. In the event you do not advise us within 14 days of your willingness to proceed with the transfer of these properties in accordance with the bid instruments and acceptance, we are instructed to take such steps as are necessary to protect the interest of our client."

Home-Stake did not respond to this letter.

There was no further communication between Vonfeldt and Home-Stake until November 26, 1975, approximately 18 months later, when Vonfeldt's new counsel, counsel of record herein, sent a letter to Home-Stake demanding performance and tendering $261,000.00 for purchase of the Gorham property. It stated the tendered sum would be "deposited in any bank or depository that you specify upon receipt of acceptable title to all leases involved in the Gorham Waterflood Project, Russell County, Kansas." This letter further advised that if Home-Stake did not deliver title to the Gorham property an action for specific performance would be commenced.

Counsel for the Reorganization Trustee then responded on November 4, 1975 stating if litigation were commenced the Trustee would move to have it stayed. Vonfeldt filed his action for specific performance on June 24, 1976 in the District Court of Russell County, Kansas. The action in the Kansas Court was stayed

by order of the Bankruptcy Court and Vonfeldt's complaint herein was filed in this reorganization case on September 2, 1977.

Home-Stake has refused to accept Vonfeldt's tender offer or to take the necessary steps to complete the sale of the Gorham property. Neither Home-Stake nor the Participants have received any money in connection with the sale of the Gorham property.

One hundred and sixty-eight of the two hundred and nine named Participant-Defendants are in default and have not answered the complaint of Vonfeldt. The Bankruptcy Court stayed consideration of Vonfeldt's motion for default judgment against the defaulting defendants pending a determination on the merits of Vonfeldt's complaint.

Legal analysis of the matter lends itself to a determination first of Vonfeldt's rights as to the Participants and secondly, Vonfeldt's rights as to Home-Stake.

VONFELDT'S CLAIM OF SPECIFIC PERFORMANCE AGAINST THE PARTICIPANTS:

Does the Home-Stake acceptance of plaintiff's $261,000.00 bid for the Gorham property on July 20, 1973 entitle plaintiff to specific performance of the Participants' interests in the 1961 and 1963 programs. Home-Stake had no authority to sell the Participants' interests. With the exception of the five Participants who had recorded their interests, Home-Stake was the record owner of the leasehold rights in the two programs. The Home-Stake bid solicitation in June 1973 to which plaintiff responded, represented Home-Stake owned and desired to sell all of the leasehold interest. This misrepresentation was unknown to Vonfeldt because he made no investigation of the public record and had no knowledge of the unrecorded Participants' interests. Home-Stake did specifically disclaim warranty of title in connection with its leasehold interest in the bid solicitation. Vonfeldt makes no claim he is entitled to specific performance of the few Participants' interests actually filed of public record; it's for all other interests that he seeks specific performance.

Clearly there was a written offer to purchase by Vonfeldt for a valuable consideration and a written acceptance by the seller, Home-Stake. These are the fundamentals of a binding contract if the seller is the owner or has authority to sell. Vonfeldt first tendered the $261,000.00 purchase price on November 26, 1975, twenty-six months following Home-Stake's July 20, 1973 acceptance of his bid.

Vonfeldt maintains as of July 20, 1973, the date of acceptance, he became the equitable owner of the unrecorded Participants' interests with superior claim. The Court does not agree.

The Kansas recording statutes[1/] upon which plaintiff relies work to the advantage of bona fide purchasers for value. Edwards v. Myers, 127 Kan. 221, 273 P. 468 (1929).

The uncontroverted facts do not support Vonfeldt qualifies as a bona fide purchaser for value. On or about September 11, 1973 Vonfeldt learned there were many owner-participants with unrecorded undivided interests. Until that date, nor until the present time, has Vonfeldt paid any of the $261,000.00 purchase price. To be a purchaser for value, with a legitimate claim to compel specific performance, Vonfeldt must be without notice of the Participants' interest both at the time of purchase and payment of the purchase money. Peters v. Brandon, 5 Kan. App. 879, 48 P. 870 (1897); Fowler v. Merrill, 11 Howard 375 (1850); Wormley v. Wormley, 8 Wheat 421 (1823); Hyndman v. Woman's Foreign Missionary Society, 68 P2d 645 (Kan.1937); Chisholm v. Snider, 66 P2d 606 (Kan. 1937); Derby Oil Co. v. Bell, 7 P2d 39 (Kan.1932); Morris v. Wicks, 106 P. 1048 (Kan.1910); and Ennis v. Tucker, 96 P. 140 (Kan.1908)

1/ K.S.A. 58-2222. "Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall from the time of filing the same with the Register of Deeds for record, impart notice to all persons of the content thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice."

K.S.A. 58-2223. "No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the Register of Deeds for record."

Since no purchase price had been paid when he learned of the Participants' unrecorded interest, Vonfeldt cannot be characterized a bona fide purchaser for value. It was not necessary Vonfeldt know the specific unrecorded interest of each of the 204 participants. Palmer v. Crews Lumber Co.,Inc., 510 P2d 269 (Okl.1973); Wayne Bldg. & Loan Co. of Wooster v. Yarborough, 11 Ohio St.2d 195, 228 N.E.2d 841 (1967).

Vonfeldt argues the nonrecording by the Participants clothed Home-Stake with some type of authority to sell their interests. Participants and Home-Stake's written agreement specifically states Home-Stake has no authority to sell Participants' interests. A co-owner of realty generally does not have the right to sell the interest of another co-owner. 20 Am.Jur.2d, Cotenancy and Joint Ownership, §§ 2,91; Earp v. Mid-Continent Petroleum Corporation, 27 P.2d 855 (Okl. 1933). Apparent authority is inapplicable because Vonfeldt dealt with Home-Stake as principal, not as an agent with apparent authority. Master Commodities, Inc. v. Texas Cattle Management, 586 F2d 1352 (10th Cir. 1978), Restatement (Second) of Agency, §8, and Woodward Co-Operative Elevator Assn v. Johnson, 248 P2d 1002 (Okl.1952). There is no evidence the Participants were aware Home-Stake had offered their interests for sale.

Specific performance is an equitable remedy within the discretion of the court. In Re Davis' Estate, 171 Kan. 605, 237 P2d 396 (1951), and Troutfetter v. Backman, 165 Kan. 185, 193 P2d 201 (1948). Equity will not decree a useless act. 71 Am.Jur.2d, Specific Performance, §69; Pierce v. Burton, 212 Kan. 458, 511 P2d 217 (1973). Home-Stake could not be compelled to perform the contract to convey the Participants' interests because their interests are not Home-Stake's to convey.

Many of the Participants are in default, having failed to answer plaintiff's complaint. The plaintiff argues the Bankruptcy Court erred in failing to grant a judgment by default against them. Plaintiff states the language "...the Court upon request therefor shall enter a judgment by default..." (emphasis supplied) in bankruptcy rule 755 removes any court discretion and mandates

the granting of a default judgment. Bankruptcy Rule 755 must be read in the context of the complete rule as well as the Advisory Committee note. The rule also states:

> "If, in order to enable the Court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the Court may conduct such hearings as it deems necessary and proper."

The Advisory Committee note reminds us Bankruptcy Rule 755 is an adaptation of Title 28, F.R.C.P., Rule 55 and states "The Court may withhold entry of a default judgment whenever it deems further investigation or hearings to be necessary."

In Re Chandler, 424 F.Supp. 142 (E.D. Mo. 1975) rejects plaintiff's contention stating the word "shall" in Rule 755 does not remove the Court's discretion. This interpretation is in keeping with that given F.R.C.P., Rule 55. The Bankruptcy Court's ruling has support in Frow v. DeLaVega, 82 U.S. (15 Wall.) 552, 21 Law Ed. 60 (1872), 47 Am.Jur.2d, Judgments, §1160, 78 ALR 938, and Reliance Insurance Cos. v. Thompson-Hayward Chemical Co., 519 P2d 730 (Kan.1974), and Jenkins v. Arnold, 573 P2d 1013 (Kan. 1978). The accepted rule prevents the inequitable and incongruous result of a judgment against the defendants in default and favorable to the answering defendants on the merits, when the issue involves a community of interest. Blind adherence to plaintiff's "shall" interpretation could require granting a default judgment even when plaintiff's claim is totally without merit.

VONFELDT'S CLAIM OF PARTIAL SPECIFIC PERFORMANCE AGAINST HOME-STAKE AND TRUSTEE:

Does Home-Stake's acceptance of plaintiff's $261,000 bid for the Gorham property entitle the plaintiff to partial specific performance of Home-Stake's interest in the 1961 and 1963 programs owned on July 20, 1973 and the additional interest Home-Stake acquired after July 20, 1973 by Order of the Bankruptcy Court when certain participants' abandoned their interests?

In his conclusions of law filed herein on July 20, 1979, the bankrupcy Judge stated:

> "Assuming that a contract of sorts was created between plaintiff and Home-Stake by the bid and acceptance it is apparent that it was, and is, impossible of performance by either Home-Stake or its successor, the reorganization trustee. The contract was for 100 percent of the working interest in the Gorham property and this neither Home-Stake nor the trustee can deliver. At best, title to only a fractional, minority interest could be conveyed by these defendants.
>
> "Consistently, over the years this problem has lingered, it has been the position of plaintiff with knowledge of the participants' title and interest that Home-Stake, and then the trustee, could be compelled to convey the total working interest in the property. Rather than asserting enforcement of that portion of the contract which these defendants might have been capable of performing and a proportionate abatement of the bid price it is clear that plaintiff still seeks in this proceeding specific performance as to the total working interest in exchange for $261,000.00.
>
> "It has been concluded that plaintiff is not entitled to judgment settling in him the participants' interests and the contract upon which plaintiff's action here is based is impossible for either the trustee or Home-Stake to perform. The relief of specific performance will not be granted when it is impossible for the parties against whom it is sought to perform, 71 Am. Jur. 2d, Specific Performance, §69."

At the hearing before this Court on March 5, 1980 and in his brief filed November 1, 1979 Vonfeldt argues, among other things, that he is "entitled to a decree of specific performance concerning defendant trustee's interest because plaintiff is willing to accept an assignment conveying defendant trustee's interest with an abatement in the purchase price." In support of his position Vonfeldt cites Wilcox v. Wyandotte World-Wide, Inc., 208 Kan 563, 493 P.2d 251, at page 256 in which the Court stated:

> "A court of equity may and, where equity requires it, will grant partial specific performance of a contract for the sale of real estate by enforcing the contract as to only a part of the land contracted for, and apportion the contract price.

> This may be done notwithstanding no apportionment is provided for in the contract. (Emphasis Ours) In Crockett v. Gray, 31 Kan 346, 2 Pac 809, the contract provided for the conveyance of 33 acres and it was established that one acre of the tract was a homestead and the contract was void, because signed by the husband alone. Specific performance of the contract for the remaining 32 acres was decreed with an abatement of the purchase price for the value of the homestead acre. The same rule is recognized in Williams v. Wessels, 94 Kan 71, 145 Pac 856. There the owner of land contracted for its sale and his wife refused to join in the deed. The contract purchaser was granted specific performance, receiving an abatement in the agreed purchase price to the extent to which the value of the title he obtained was diminished by the outstanding interest of the wife. Under similar circumstances specific performance was granted in Herman v. Sawyer, 112 Kan 6, 209 Pac 663. The rule has also been recognized in Hollingsworth v. Sell, 167 Kan 405, 207 P 2d 406, and in Zeigler v. Conger, 204 Kan 143, 460 P2d 515." (Vonfeldt brief, P. 38).

See also Home-Stake Production Company v. Minnis, 443 P.2d 91 (Okla. 1968).

Vonfeldt claims that "the Bankruptcy Court erred in applying the doctrine of impossibility of performance; as it is not impossible for defendant trustee to convey all interests owned or acquired by defendant Home-Stake Production Company in the Gorham property." (Vonfeldt brief, P. 39).

Vonfeldt further claims that the Bankruptcy Court erred by its holding that the contract "was for 100% working interest" in the Gorham property. Vonfeldt argues that "the Bankruptcy Court ignored or overlooked letter dated June 15, 1973, soliciting bids on the Gorham property" which provided that there would be "no warranty of titles or covenants of titles as to the leasehold rights." He claims the Bankruptcy Court "overlooked the exhibits attached to the June 15, 1973 letter of Home-Stake Production which clearly reflects that Home-Stake Production Company did not own 100% of said working interest in the oil and gas leases." (Vonfeldt

brief, P. 36). Vonfeldt also claims that he has the right to make "post-contractual concessions" and take "any percentage of the working interest instead of a 100% working interest." Wallerius v. Hare, 200 Kan 578, 438 P.2d 65. (Vonfeldt brief, P. 36-37).

The Bankruptcy Court held that Vonfeldt did not at any time during the proceedings before that Court assert enforcement of that portion of the contract which Home-Stake and the Trustee might have been capable of performing with a proportionate abatement of the bid price but instead was seeking specific performance of the total working interest. (Bankrupcty Court Conclusions of Law, P. 11).

In his Complaint Vonfeldt seeks specific performance of the contract as to all defendants and prays for "such other and further relief as is just." (Tr. - 6 - 5). Although the issues were never clearly defined by the pleadings before the Bankrupcty Court with respect to partial specific performance, Vonfeldt did argue in his reply brief to Defendants' Motions for Summary Judgment and in support of his Motion for Summary Judgment that the "defendant trustee has cited no authority excusing defendant trustee from being compelled to convey his legal interest in the Gorham Water Flood properties except doctrine of 'executory contract'." (Tr. 133 - 16).

In the Trustee's brief in support of his Motion for Summary Judgment the Trustee states "Vonfeldt has not asked for partial performance by Home-Stake nor has he pleaded that the alleged contract is severable. Vonfeldt has had no intention of purchasing any fractional portion of the Gorham Property. Vonfeldt deposition, P. 88. In any event, the remedy of specific performance is not available against a trustee in a proceeding under Chapter X of the Bankruptcy Act." (Tr. 129-2). The Trustee argued before the Bankruptcy Court that the alleged contract between Vonfeldt and

Home-Stake was repudiated prior to the filing of the Chapter X proceedings; that in a Chapter X proceeding a party seeking to preserve his rights under an executory contract can petition the Court to either adopt or reject such contract; that if the Court adopts the contract there is seldom a need for requesting specific performance and if the Court rejects the contract, the party is then left with a claim for damages. (Tr. 129-3).

Although, as indicated above, the Bankruptcy Court recognized that Vonfeldt could have asked for partial specific performance with abatement of the purchase price, the issues relating to that form of relief were not fully developed in the Bankruptcy proceeding. Instead, the Bankruptcy Court sustained the Trustee's motion for summary judgment based upon the pleadings, briefs and the parties' "Stipulation of Facts."

Rule 54(c) of the Federal Rules of Civil Procedure which applies to Chapter X adversary proceedings, (Rule 754, Rules of Bankruptcy Procedure), provides in part: "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

In Holt Civic Club v. Tuscaloosa (1978, U.S.) 58 L.Ed.2d 292, 99 S.Ct. 383, the Supreme Court, after citing Rule 54(c) Fed.Rule Civ.Proc., stated:

> "Thus, although the prayer for relief may be looked to for illumination when there is doubt as to the substantive theory under which a plaintiff is proceeding, its omissions are not in and of themselves a barrier to redress of a meritorious claim."

In United States v. White County Bridge Commission, 275 F2d 529 (7th Cir. 1960), the Court stated:

> "The general rule in appraising the sufficiency of a complaint for failure to state a claim is that a complaint should not be dismissed '* * * unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to

relief.' Conley v. Gibson, 1957, 355 U.S. 41, 45, 46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80; Seymour v. Union News Company, 7 Cir., 1954, 217 F.2d 168; and see Rule 54(c), Demand for Judgment, Federal Rules of Civil Procedure, 28 U.S.C.A.: '* * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.'"

Also in Gerasta v. Hibernia Nat. Bank, 411 F.Supp. 176 (DC, ED La. 1976) the Court held that since the Complaint contained a request "for such other general and equitable relief as the law and the facts may warrant", such request was sufficient to grant the relief ordered although "not specifically requested."

In W. V. Norton, et al. v. Wesley Liddel, et al., No. 78-1712 (10th Cir. March 6, 1980), the Court stated:

> "We are bound by the long standing doctrine that pleadings, documentary issues, and factual inferences tending to show issues of material fact should be viewed in the light most favorable to the party opposing summary judgment, Harsha v. United States, 590 F.2d 884 (10th Cir. 1979), and that summary judgment must be denied unless the moving party demonstrates its entitlement beyond a reasonable doubt. Madison v. Deseret Livestock Co., 574 F.2d 1027 (10th Cir. 1978)."

In view of the fact that the issues touching on Vonfeldt's claim for partial specific performance with abatement of the purchase price were not fully developed in the proceedings before the Bankruptcy Judge, it is the view of this Court that the matter should be remanded to the Bankruptcy Court for further hearing and judgment on those issues.

Rule 810 of the Rules of Bankruptcy Procedure states:

> "Upon an appeal the district court may affirm, modify, or reverse a referee's judgment or order, or remand with instructions for further proceedings. The court shall accept the referee's findings of fact unless they are clearly erroneous * * *"

IT IS THEREFORE ORDERED that the judgment of the Bankruptcy Court in favor of the Defendant-Appellee Home-Stake

Production Company Trustee be and is hereby reversed and the matter is hereby remanded to the Bankruptcy Court for further proceedings in accordance with the views expressed herein.

IT IS FURTHER ORDERED that the judgment of the Bankruptcy Court in favor of the 209 named Defendants-Appellees (Participants) be and is hereby affirmed.

Dated this 4TH day of June, 1980.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

AGRICO CHEMICAL COMPANY,)
)
Plaintiff,)
)
vs.) No. 78-C-20-C
)
AIRCO, INC.,)
)
Defendant.)

ORDER

The Court now considers plaintiff's Motion to Dismiss this action without prejudice pursuant to Rule 41, F.R.Civ.P. As grounds therefor, plaintiff states that it recently learned that at the time this action was filed, defendant Airco, Inc., was a Delaware corporation, and not a New York corporation as alleged in the Complaint. The response from defendant supports this contention, and the Court finds that in fact defendant is a Delaware corporation. Because plaintiff is also a Delaware corporation, there is no diversity between the parties and this Court lacks jurisdiction. The action must therefore be dismissed.

Simultaneously with its Motion to Dismiss, plaintiff also filed the following motions:

1. Application to Postpone Preparation of Pretrial Order

2. Application for Leave to Withdraw Answer to Counterclaim and to File Motion to Dismiss Defendant's Counterclaim

3. Motion to Dismiss Counterclaim

4. Motion to Reconsider

The jurisdictional defect that mandates the dismissal of plaintiff's Complaint has the same effect on defendant's Counterclaim. From the facts now before the Court, it is apparent that this controversy was never legitimately before

this Court, and the formalities of granting plaintiff leave to withdraw its Answer to the Counterclaim in order to file a motion to dismiss are unnecessary. Plaintiff's Motion to Dismiss the Counterclaim will be sustained.

Plaintiff's Application to Postpone Preparation of Pretrial Order is moot.

Finally, plaintiff asks that this Court's Order of May 9, 1980, which sustained in part and overruled in part defendant's Motion for Partial Summary Judgment, be withdrawn for lack of jurisdiction. Plaintiff provides no authority for such withdrawal; neither does plaintiff provide authority for the Court's consideration of a Motion to Reconsider in the face of impending dismissal for lack of subject matter jurisdiction.

Because this Court does not now have--and never did have--subject matter jurisdiction, this action must be dismissed without further consideration of the merits. Plaintiff's Motion to Reconsider will therefore be overruled.

For the foregoing reasons, plaintiff's Motion to dismiss will be sustained, and this action will be dismissed without prejudice for lack of subject matter jurisdiction. All of plaintiff's other motions will be overruled.

It is so Ordered this 4th day of June, 1980.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

AGRICO CHEMICAL COMPANY, Plaintiff,	)	
vs.	)	No. 78-C-20-C
AIRCO, INC., Defendant.	)	

FILED

JUN 4 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court now considers defendant's Application to Tax Costs and Order Return of Confidential Documents.

Defendant seeks compensation from plaintiff pursuant to Title 28 U.S.C. §§1919 and 1920. Plaintiff filed this action on January 13, 1978, alleging that it was a Delaware corporation and that defendant was a New York corporation. It has since been found that defendant is, and was at the filing of this lawsuit, a Delaware corporation, thus depriving this Court of subject matter jurisdiction for lack of diversity of the parties.

Having read the arguments of the parties, and being fully advised in all premises, the Court will overrule defendant's Application to Tax Costs against plaintiff.

Defendant also seeks a return to the appropriate parties of all documents marked "Confidential" pursuant to paragraph 1(f) of this Court's "Discovery Protective Order", dated July 28, 1978. Plaintiff has not objected to this application. Because this action is invalid for lack of subject matter jurisdiction in this Court, defendant's Application for the return of these documents will be granted.

For the foregoing reasons, it is hereby ordered that defendant's Application to Tax Costs against plaintiff be overruled. It is further ordered that defendant's Application for an Order for the return of documents is granted, and the parties are so

ordered. The parties have thirty (30) days from the date of this Order to comply.

It is so Ordered this 4 day of June, 1980.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 3 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

RELIANCE INSURANCE COMPANY, a Corporation, Plaintiff,	)	
vs.	)	No. 80-C-68-BE
JEANNINE L. CARNES and RUTH M. CARNES, Defendants.	)	

ORDER OF DISMISSAL OF PLAINTIFF'S COMPLAINT

NOW on this 3rd day of ~~May~~ June, 1980, upon the written stipulation of the plaintiff for a dismissal with prejudice of the plaintiff's complaint, the Court having examined said Stipulation for Dismissal, finds that the parties have entered into a compromise settlement of all of the claims involved herein, and the Court being fully advised in the premises finds that the plaintiff's complaint against the defendants should be dismissed with prejudice.

IT IS THEREFORE ORDERED BY THE COURT that the complaint of the plaintiff against the defendants be and the same is hereby dismissed with prejudice to any futher action.

James O. Ellison
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 3 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

LEHIGH STECK - WARLICK, INC., a Corporation,	)	
Plaintiff,	)	
vs.	)	No. 79-C-610-E
CONSUMER SAMPLES, INC., an Oklahoma Corporation,	)	
Defendant.	)	

JUDGMENT

The Defendant, Consumer Samples, Inc., having failed to plead or otherwise defend in this action and its default having been entered.

NOW, upon application of the Plaintiff and upon affidavit that the Defendant is indebted to Plaintiff in the sum of $33,832.42, that Defendant has been defaulted for failure to appear, it is hereby:

ORDERED, ADJUDGED AND DECREED that Plaintiff, Lehigh Steck - Warlick, Inc., recover from the Defendant, Consumer Samples, Inc., the sum of $33,832.42, with interest at the rate of 12% per annum from May 20, 1979, until paid, together with an attorney's fee in the amount of $3,400.00, and costs totalling the sum of $69.00.

James O. Ellison

~~Jack C. Silver~~ James O. Ellison
Judge ~~Clerk~~ of the United States
District Court for the Northern
District of Oklahoma

Dated: June 3, 1980

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELMER CHANDLER, citizen of Missouri, and ROADWAY EXPRESS, INC., an Ohio corporation, Plaintiffs	)	
vs.	)	No. 79-C-134-E
ARLES FERGUSON AND TOMMY REHEARD, both citizens of Oklahoma Defendants	)	

JUDGMENT

This action came on for trial before the Court and a jury, the undersigned Honorable James O. Ellison, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that Judgment be entered in favor of Plaintiff Elmer Chandler and against Defendant Arles Ferguson in the sum of $20,000, and against Defendant Tommy Reheard in the sum of $10,000.

IT IS FURTHER ORDERED AND ADJUDGED that Judgment be entered in favor of Plaintiff Roadway Express, Incorporated and against Defendant Arles Ferguson in the sum of $2,400 and against Defendant Tommy Reheard in the sum of $1,200.

IT IS FURTHER ORDERED AND ADJUDGED that Judgment on the Cross-Claim be entered in favor of Defendant Arles Ferguson and against Defendant Tommy Reheard.

Dated this 10 day of June, 1980.

James O. Ellison
James O. Ellison
United States District Judge

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA JUN 3 19

Jack C. Silver, Clerk
U. S. DISTRICT COURT

LEO VERNE HILL,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. 79-C-524-BT
	)	
MADISON, INC.,	)	
	)	
Defendant.	)	

O R D E R

Now, on this 3RD day of June, 1980, there having been submitted to the Court a Stipulation for Dismissal, filed on behalf of all parties to the above entitled action and stipulating that said action may be dismissed with prejudice, the Court finds that the stipulated dismissal should be allowed.

NOW IT IS, THEREFORE, ORDERED, that the above entitled action be, and the same hereby is, dismissed with prejudice each party to bear its own costs, in accordance with the Stipulation for Dismissal filed herein.

s/ Thomas R. Brett

THOMAS R. BRETT
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BARBARA JOHNSON, et al.,

Plaintiffs,

vs.

HOUSING AUTHORITY OF THE CITY OF TULSA, et al.,

Defendants.

No. 75-C-421-C

FILED

JUN 2 1980

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

NOW, on this 2nd day of ~~April~~ June, 1980, the Court has for its consideration the Stipulation for Dismissal jointly filed in the above-styled and numbered cause by the remaining plaintiffs and the defendants, Housing Authority of the City of Tulsa, J. Thomas Hares, Floyd Johnson and Don Brooks. Based upon the representations and requests of the parties, as set forth in the foregoing stipulation, it is

ORDERED that plaintiffs' Complaint and claims for relief against the defendants, Housing Authority of the City of Tulsa, J. Thomas Hares, Floyd Johnson and Don Brooks, be and the same are hereby DISMISSED with prejudice. It is further

ORDERED that the plaintiffs are directed not to disclose the nature and terms of the amicable settlement reached by the parties to any third party, under penalty of contempt. The Court retains jurisdiction of the case for purposes of enforcing its order.

(Signed) H. Dale Cook
United States District Judge

APPROVED AS TO FORM AND CONTENT:

CHARLES R. HOGSHEAD,
Legal Services of Oklahoma, Inc.

Attorneys for the Plaintiffs

PRICHARD, NORMAN & WOHLGEMUTH

By Timothy J. Sullivan
Timothy J. Sullivan

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

FELDMAN, HALL, FRANDEN, REED & WOODARD

By _____
Jerry Reed

Attorneys for the Defendants,
Housing Authority of the City of Tulsa,
J. Thomas Hares, Floyd Johnson and
Don Brooks